

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

NORMAN CRONEY,

Plaintiff,

v.

9:23-CV-1449
(DNH/DJS)

D. MEDBURY, *et al.*,

Defendants.

APPEARANCES:

NORMAN CRONEY

Plaintiff, *pro se*

16-A-0510

Sing Sing Correctional Facility
354 Hunter Street
Ossining, New York 10562

HON. LETITIA JAMES

New York State Attorney General

Counsel for Defendants

The Capitol

Albany, New York 12224

OF COUNSEL:

ALEXANDRA GALUS, ESQ.

DANIEL J. STEWART

United States Magistrate Judge

REPORT-RECOMMENDATION and ORDER¹

Plaintiff brings this civil rights action, pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his rights while he was in the custody of the Department of

¹ This matter was referred to the undersigned for a report-recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

Corrections and Community Supervision (“DOCCS”). Dkt. No. 1, Compl. Specifically, the District Court permitted claims regarding alleged mail tampering and invasion of privacy to proceed against the two named Defendants and two “John Doe” Defendants.

Dkt. No. 8 at p. 14. Defendants move for Summary Judgment, pursuant to Federal Rule of Civil Procedure 56(a), seeking to dismiss the Complaint based on Plaintiff’s failure to properly exhaust his administrative remedies. Dkt. No. 22. In the alternative, the named Defendants also seek dismissal under Federal Rule of Civil Procedure 12(b)(6) based on a lack of personal involvement. *Id.* Plaintiff opposes the Motion, Dkt. No. 25, Pl.’s Opp., and Defendants have filed a reply. Dkt. No. 26. Defendants have not yet answered the Complaint and no discovery has taken place.

For the reasons that follow, the Court recommends that the Motions be **DENIED**.

I. BACKGROUND

The allegations in the Complaint relate to alleged tampering with Plaintiff’s legal mail while he was housed at Marcy Correctional Facility. *See generally* Compl. Plaintiff alleges that on August 10, 2023, an unidentified correctional employee² arrived at Plaintiff’s cell to give him legal mail. Plaintiff claims that a copy of a large manila envelope was provided to him with his legal mail, but that the actual envelope was discarded and destroyed by the Doe Defendant. Compl. at p. 4. The Complaint goes on

² This individual is sued here as John/Jane Doe.

to allege that upon inspecting the contents provided to him, all the documents indicated in the cover letter were not present. *Id.* Plaintiff alleges that his mail was tampered with and that he filed a grievance asserting this fact. *Id.*; Pl.'s Opp. at p. 7. The Complaint also alleges that Plaintiff spoke with the Deputy Superintendent about the incident and that the Deputy Superintendent later explained to Plaintiff via letter that certain facility mail policies were the basis of the large manila envelope being confiscated. Compl. at p. 4; Pl.'s Opp. at p. 6. DOCCS has no record of a grievance being filed regarding this incident. Dkt. No. 22-5, Pfendler Decl., ¶ 22.

Plaintiff alleges a similar incident occurred on October 19th, when the law library officer gave Plaintiff legal mail, again destroying the large envelope, and Plaintiff again finding the mail to be missing items he claims should have been there. Compl. at p. 4. He claims that both incidents were the result of a facility mail directive put in place by the named Defendants. *Id.* Plaintiff specifically alleges that the policy enabled other correctional staff to tamper with inmate mail. *Id.* at p. 5. While Plaintiff again alleges that he filed a grievance regarding the October incident, *id.*; Pl.'s Opp. at p. 10, Defendants maintain there is no record of any grievance regarding this matter. Pfendler Decl. at ¶ 22.

II. LEGAL STANDARDS

A. Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate only where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The moving party bears the burden to demonstrate through “pleadings, depositions, answers to interrogatories, and admissions on file, together with [] affidavits, if any,” that there is no genuine issue of material fact. *F.D.I.C. v. Giannmettei*, 34 F.3d 51, 54 (2d Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

To defeat a motion for summary judgment, the non-movant must set out specific facts showing that there is a genuine issue for trial, and cannot rest merely on allegations or denials of the facts submitted by the movant. FED. R. CIV. P. 56(c); *see also Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003) (“Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case.”); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994). To that end, sworn statements are “more than mere conclusory allegations subject to disregard . . . they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion” and the credibility of such statements is better left to a trier

of fact. *Scott v. Coughlin*, 344 F.3d at 289 (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983) and *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995)).

When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Nora Beverages, Inc. v. Perrier Grp. of Am., Inc.*, 164 F.3d 736, 742 (2d Cir. 1998). “[T]he trial court’s task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.” *Gallo v. Prudential Residential Servs., Ltd. P’ship*, 22 F.3d 1219, 1224 (2d Cir. 1994). Furthermore, where a party is proceeding *pro se*, the court must “read [his or her] supporting papers liberally, and . . . interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994), *accord*, *Soto v. Walker*, 44 F.3d 169, 173 (2d Cir. 1995). Nonetheless, summary judgment is appropriate “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

B. Motion to Dismiss

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). The trial court’s function “is merely to

assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.” *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (*overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984)).

The Court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the “well-pleaded” allegations of the complaint. *See Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 373 U.S. 746, 754 (1963). Nevertheless, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Therefore, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citation omitted). A motion to dismiss pursuant to Rule 12(b)(6) may not be granted so long as the Plaintiff’s complaint includes “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. at 697.

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. at 678. This plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* In this respect, to survive dismissal, a plaintiff “must provide the grounds upon which his claim rests through factual allegations sufficient ‘to raise a right to relief above the speculative level.’” *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 440 U.S. at 555). Thus, in spite of the deference the court is bound to give to Plaintiff’s allegations, it is not proper for the court to assume that “the [plaintiff] can prove facts [which he or she] has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged.” *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). The process of determining whether a plaintiff has “nudged [his] claims . . . across the line from conceivable to plausible,” entails a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. at 679-80.

Where, as here, the complaint was filed *pro se*, it must be construed liberally with “special solicitude” and interpreted to raise the strongest claims that it suggests. *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011). Nonetheless, a *pro se* complaint must state a plausible claim for relief. *See Harris v. Mills*, 572 F.3d 66, 73 (2d Cir. 2009).

III. DISCUSSION

A. Exhaustion of Administrative Remedies

1. Exhaustion Procedure

The Prison Litigation Reform Act (“PLRA”) provides, in pertinent part, that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The Supreme Court has held that “the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (citation omitted). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. *Id.* at 524; *see also Ross v. Blake*, 578 U.S. 632, 638 (2016) (stating that the mandatory language of § 1997e(a) forecloses judicial discretion to craft exceptions to the requirement). Furthermore, § 1997e(a) requires “proper exhaustion,” which means using all steps of the administrative process and complying with “deadlines and other critical procedural rules.” *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). The defendant bears the burden of proving that the administrative remedies available to the plaintiff were not exhausted prior to the

initiation of a civil action. *Howard v. Goord*, 1999 WL 1288679, at *3 (E.D.N.Y. Dec. 28, 1999).

In New York, the administrative remedies consist of a three-step Incarcerated Grievance Program (“IGP”). First, a grievance is submitted to the Incarcerated Grievance Resolution Committee (“IGRC”), a committee comprised of both inmates and facility employees. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(b). An inmate must submit a grievance “within 21 calendar days of an alleged occurrence.” *Id.* at § 701.5(a)(1). An inmate may request an extension of the time limit within forty-five days of the date of the alleged occurrence. *Id.* at § 701.6(g). The IGRC reviews and investigates the formal complaint and then issues a written determination. *Id.* at § 701.5(b). Second, upon appeal of the IGRC decision, the superintendent of the facility reviews the IGRC’s determination and issues a decision. *Id.* at § 701.5(c). Finally, upon appeal of the superintendent’s decision, the Central Office Review Committee (“CORC”) makes the final administrative determination. *Id.* at § 701.5(d). Only upon exhaustion of all three levels of review may a prisoner seek relief in federal court. *Bridgeforth v. Bartlett*, 686 F. Supp. 2d 238, 239 (W.D.N.Y. 2010) (citing, *inter alia*, *Porter v. Nussle*, 534 U.S. at 524); see also *Neal v. Goord*, 267 F.3d 116, 121 (2d Cir. 2001), overruled on other grounds by *Porter v. Nussle*, 534 U.S. 516.

2. The Record Regarding Exhaustion

While DOCCS' departmental records show no indication that Plaintiff filed a grievance regarding the alleged mail tampering, Pfendler Decl. at ¶ 22, he has offered what he purports to be the grievances he filed in opposition to the Motion. Pl.'s Opp. at pp. 7 & 10. He also offers additional correspondence he maintains was submitted to grievance officials at the facility inquiring about the status of the grievances and asking, based on the purported lack of a response, that the grievances be moved to the next step in the administrative process. *Id.* at pp. 8-9 & 11-12. These documents do not establish that they were in fact filed with correctional staff, but they are sufficient at the very least to raise a question of fact about whether Plaintiff sought to and was in some way prevented from utilizing the grievance process. This case is different in that regard from others where a plaintiff made a purely conclusory allegation that he had filed grievances, with no documentary proof. *See, e.g., Gough v. Morris*, 2018 WL 7199494, at *4 (N.D.N.Y. Dec. 14, 2018), *report and recommendation adopted*, 2019 WL 416150 (N.D.N.Y. Feb. 1, 2019) (recommending that summary judgment be granted when plaintiff's opposition failed to "provide copies of the any alleged grievances regarding this incident."); *see also Gibbs v. Gadway*, 2019 WL 5191506, at *3 (N.D.N.Y. Oct. 15, 2019), *report and recommendation adopted*, 2020 WL 1227156 (N.D.N.Y. Mar. 13, 2020).

This together with Plaintiff's specific allegations that grievances were not properly processed at Marcy Correctional Facility, Pl.'s Opp. at p. 14, create a question of fact sufficient to defeat summary judgment at this stage of the litigation. While the Court has the ability to order an exhaustion hearing, *see Messa v. Goord*, 652 F.3d 305, 309 (2d Cir. 2011), doing so here without the benefit of discovery would not be the most efficient manner in which to resolve the factual disputes presented here. "Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *see also Roebuck v. Hudson Valley Farms, Inc.*, 208 F.R.D. 34, 36 (N.D.N.Y. 2002) (finding summary judgment premature where plaintiff had not yet been afforded opportunity to conduct relevant discovery). Rather, the Court recommends that the Motion for Summary Judgment be denied as premature.

B. Personal Involvement

Defendants alternatively seek dismissal, under FED. R. CIV. P. 12, based on the lack of personal involvement in the actual incidents Plaintiff contends constituted tampering with his mail. Defs.' Mem. of Law at pp. 12-14.

In the Second Circuit, "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (quoting *Moffitt v. Town of Brookfield*,

950 F.2d 880, 885 (2d Cir. 1991)). Several behaviors may indicate the “personal involvement” of prison workers or supervisors in depriving an incarcerated individual of their constitutional rights. *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986). For instance, a defendant may be personally liable for violating an incarcerated individual’s constitutional rights if they “directly participated in the infraction.” *Id.* Separately, a “supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue.” *Id.* (citing *McCann v. Coughlin*, 698 F.2d 112, 125 (2d Cir. 1983)).

However, the Supreme Court limited supervisory liability, and the Second Circuit clarified that the doctrine of *respondeat superior* does not apply to supervisors in cases involving a subordinate government worker’s unconstitutional conduct, and that “there is no special rule of liability for supervisors.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *Tangreti v. Bachmann*, 983 F.3d 609, 618 (2d Cir. 2020) (quoting *Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010)). “[A] plaintiff must plead and prove ‘that each Government-official defendant, through the official’s own actions, has violated the Constitution.’” *Tangreti v. Bachmann*, 983 F.3d 609, 616 (2d Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. at 676).

Plaintiff has, however, sufficiently articulated a claim that an institutional policy may have been implemented that interfered with his mail. He specifically alleges that

“[d]ue to the Superintendent . . . and the Deputy Superintendent . . . making a facility rule confiscating envelopes larger than a standard size business envelope, this gave (John/Jane Doe) the opportunity to tamper with my legal mail on August 10th. And John Doe the opportunity to tamper as well as seize my legal mail on October 19th 2023.”

Compl. at pp. 4-5. That allegation sufficiently alleges direct personal involvement of each named Defendant in any alleged violation of Plaintiff’s rights. Contrary to the arguments made in support of dismissal, Plaintiff’s claim is not based on allegedly ignoring complaints he made or because Defendants supervise the individuals who tampered with or confiscated Plaintiff’s mail, Defs.’ Mem. of Law at pp. 11-13, but that the named Defendants specifically implemented a policy that permitted or facilitated tampering with inmate mail. Nor is the Court persuaded by the argument that Plaintiff has made a purely conclusory allegation connecting that policy to the alleged mail tampering. *Id.* at p. 14. Rather, Plaintiff specifically alleged that the policy provided the John Doe Defendants with the ability to engage in the alleged tampering. Compl. at pp. 4-5. “Legal mail is entitled to a higher degree of protection than regular mail, and prison policies or practices which interfere with legal mail on a regular basis whether incoming or outgoing must be supported by a legitimate penological interest other than mere general security concerns which permit interference with regular mail.” *Guillory*

v. *Ellis*, 2014 WL 4365274, at *13 (N.D.N.Y. Aug. 29, 2014) (internal quotation omitted).

Plaintiff has sufficiently alleged the personal involvement of the Superintendent and Deputy Superintendent regarding the implementation of a mail policy and the Motion to Dismiss, therefore, should be denied.

IV. CONCLUSION

WHEREFORE, it is hereby

RECOMMENDED, that the Motions for Summary Judgment and to Dismiss (Dkt. No. 22) be **DENIED**; and it is

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14)³ days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v.*

³ If you are proceeding *pro se* and are served with this Order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the order was mailed to you to serve and file objections. FED. R. CIV. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. FED. R. CIV. P. 6(a)(1)(C).

Racette, 984 F.2d 85, 89 (2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)); see also 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72 & 6(a).

Date: November 12, 2024
Albany, New York



A handwritten signature in black ink, appearing to read "Daniel J. Stewart". Below the signature is a horizontal line, followed by the typed name "Daniel J. Stewart" and the title "U.S. Magistrate Judge".

 KeyCite Yellow Flag - Negative Treatment
Declined to Follow by [Torrence v. Pesanti](#), D.Conn., January 10, 2003

1999 WL 1288679
Only the Westlaw citation
is currently available.

United States District Court, E.D. New York.

Carter HOWARD, 95-A-1559, Plaintiff,
v.

Glenn S. GOORD, Commissioner,
Frank Headly, Superintendent, Gerald
A. Wells, Deputy Supt. of Security,
Dennis Breslin, Deputy Supt. of Programs,
Dr. Jamshid Tehrany, Dr. Jennifer
Mitchell, Head Doctor, Individually and
in Their Official Capacities, Defendants.

No. 98-CV-7471 (FB).

|
Dec. 28, 1999.

Attorneys and Law Firms

[Carter Howard](#), Attica Correctional Facility,
Attica, New York, for the Plaintiff, pro se.

[Eliot Spitzer](#), Attorney General of the State
of New York, By: Tiffany M. Foo, Associate
Attorney General, New York, New York, for
the Defendants.

MEMORANDUM AND ORDER

[BLOCK](#), J.

*1 Plaintiff Carter Howard ("Howard"), an inmate in a New York State correctional facility, brings this civil rights action *pro se* pursuant to 42 U.S.C. §§ 1983, 1985,

2201 and 2202, alleging that prison officials who allegedly failed to provide him with adequate medical care and to protect him from attacks by other inmates violated his Eighth and Fourteenth Amendment rights. He seeks damages and injunctive relief, as well as attorney's fees. Defendants Glenn S. Goord ("Goord"), Frank Headly ("Headly"), Gerald A. Wells ("Wells"), Dennis Breslin ("Breslin"), Jamshid Tehrany ("Tehrany") and Jennifer Mitchell ("Mitchell") are employees of the New York State Department of Corrections ("DOCS"). They move pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to exhaust administrative remedies and, alternatively, for failure to state a claim.

BACKGROUND

The following facts are drawn from the complaint: Beginning in 1995, Howard was incarcerated in the DOCS Arthur Kill Correctional Facility ("Arthur Kill") in Staten Island, New York. He suffers from [sleep apnea](#), a medical condition which makes breathing when lying down difficult, and makes him snore very loudly. On numerous occasions, while Howard was sleeping, other inmates threw items at him and hit him in order to make him stop snoring. Several times, corrections officers awakened him to stop his snoring. On other occasions, Howard fought with inmates who complained about his snoring. Howard was repeatedly transferred to different housing units in order to remove him from abusive inmates, but each time, the inmates in his new unit complained about his snoring and threw objects at him during the night.

In April 1995, Howard began to complain to the prison medical staff about his snoring. In June 1997, Howard saw a University of Staten Island hospital specialist who recommended corrective surgery, but required that Howard lose weight before undergoing surgery. Howard requested that prison doctors place him in a therapeutic weight loss program, but they failed to do so.

Since 1995, Howard has made numerous oral and written complaints to prison officers and officials about his snoring-related problems with other inmates, and since 1997, about his failure to have surgery and to be put into a weight loss program. The complaint does not describe the Arthur Kill grievance process or state whether Howard used all of the available grievance procedures; instead, it describes specific examples of Howard's efforts to obtain relief. For example, he wrote letters to Goord, the DOCS Commissioner; Headly, the Arthur Kill Superintendent; and G. Wells, the Arthur Kill Deputy of Security. In September 1997, he filed an administrative grievance against Tehrany, a prison doctor, for failing to process the paperwork needed to arrange for the surgery. On September 23, 1997, the Grievance Committee recommended that he be seen by the medical staff and sent for outside hospital treatment, although, for some unexplained reason, Howard appealed this decision to the Inmate Grievance Program Central Office Review Committee.

*2 On September 29, 1997, Lester Wright, the DOCS Chief Medical Officer, responded to Howard's letter to Goord, writing: "You are on a *sleep-apnea* study program at the

local hospital. The recommendation from this study will be reviewed by the facility medical director and the appropriate plan of care will be implemented." Complaint, Exhibit C. On December 9, 1997, Margaret Wyke ("Wyke"), the DOCS Regional Health Service Administrator, wrote to Howard, stating: "Please be advised that the outside consultants at Staten Island University Hospital have determined that you must lose weight before they can consider surgery. You will be called for counseling and education regarding a weight loss program by the health staff at Arthur Kill." Complaint, Exhibit F. On December 25, 1997, Howard wrote to Wyke to advise her of his condition and treatment, and stated: "The purpose of this letter is to alert all administrative body [sic], facility officials, of the potential law suit [sic] if another incident takes place before this minor operation is performed." Complaint, Exhibit F-1. On March 18, 1998, Breslin, a DOCS staff member, wrote to Howard, stating: "I have been advised by the Medical Department that you are as of this point scheduled for an operation to deal with your snoring problem. Nurse Halderman has told me that you have been advised to lose a significant amount of weight in order to relieve the snoring situation. Your failure to comply with this medical advice is prolonging the snoring problem." Complaint, Exhibit G. Howard also wrote to the New York State Education Department to complain about Mitchell, the principal doctor at Arthur Kill.

DISCUSSION

Under the Prison Litigation Reform Act ("PLRA"), which "Congress adopted with

the principal purpose of deterring frivolous prisoner lawsuits and appeals,” *Nicholas v. Tucker*, 114 F.3d 17, 20 (2d Cir.1997), a court may, on the motion of a party, dismiss a prisoner’s complaint regarding prison conditions because the plaintiff has failed to exhaust his or her administrative remedies, *see 42 U.S.C. § 1997e(a)*, or because the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a party who is immune from such relief,¹ *see 42 U.S.C. § 1997e(c)*. *See also Harris v. Gunderman*, 30 F.Supp.2d 664, 665 (S.D.N.Y.1999) (granting defendants’ motion to dismiss without prejudice for failure to exhaust administrative remedies); *Cruz v. Jordan*, __ F.Supp.2d __, 98-CV-0363, 1999 WL 557519, at * 11 (S.D.N.Y. July 28, 1999) (on defendants’ motion to dismiss for failure to exhaust, staying action pending exhaustion of administrative remedies).² When a defendant raises a prisoner/plaintiff’s failure to comply with the PLRA’s exhaustion requirement, the failure is properly assessed as an affirmative defense. *See Jenkins*, 179 F.3d at 28–29 (“Because, under the PLRA, a prisoner must exhaust administrative remedies before filing a § 1983 suit, ... a defendant in a prisoner § 1983 suit may also assert as an affirmative defense the plaintiff’s failure to comply with the PLRA’s requirements.”). In assessing the applicability of this defense, the Court may be required to evaluate both legal and factual issues:

*3 Whether an administrative remedy was available to a prisoner in a particular prison or prison system, and whether such remedy was applicable to the grievance underlying the prisoner’s suit, are not questions of

fact. They either are, or inevitably contain, questions of law. Where administrative remedies are created by statute or regulation affecting the governance of prisons, the existence of the administrative remedy is purely a question of law. The answer depends on the meaning of the relevant statute or regulation. Even where a grievance procedure is informally established by the warden of the prison and therefore not ascertainable by examination of statutes and regulations, the existence of the procedure may be a matter of fact, but whether it qualifies as an administrative remedy that must be exhausted under *Section 1997e(a)* is a question of law.

Id. Additionally, the Court must consider what, if any, administrative remedies the prisoner/plaintiff pursued as to each of his or her claims.

The party who may benefit from an affirmative defense bears the burden of proof. *See FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir.1994); *see also Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 107 (2d Cir.1998). However, the opposing party may defeat the affirmative defense by demonstrating that “there is an absence of evidence to support an essential element of a defense.” *Giammettei*, 34 F.3d at 54–55, or may delay the ultimate determination as to its validity until trial by showing that there is a genuine issue of material fact to be determined. *See Castro v. United States*, 34 F.3d 106, 112 (2d Cir.1994); *see also Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1535–38 (2d Cir.1997).

If, in assessing an affirmative defense raised by a defendant in a motion to dismiss before trial, the Court must consider matters

outside of the complaint, the Court must convert the motion to dismiss to one for summary judgment. *See Blissett v. Coughlin*, 66 F.3d 531, 538 (2d Cir.1995) (“[I]t is incumbent upon defendant to plead, and adequately develop, [the affirmative] defense during pretrial proceeding so that trial court can determine which claims, if any, may be disposed of by summary judgment, or, at least, which facts material to [the affirmative] defense must be presented to a jury to determine its applicability once case has gone to trial.”); *Morelli v. Cedel*, 141 F.3d 39, 45 (2d Cir.1999) (“Consideration of matters outside the pleadings converts the defendant's motion to dismiss into a summary judgment motion.”). If the Court converts a motion to dismiss to one for summary judgment, it must endeavor to provide the parties with adequate notice about the conversion and the consequences of summary judgment. *See Vital v. Interfaith Med. Ctr.*, 168 F.3d 615, 621 (2d Cir.1999); *c.f. Sawyer v. American Fed. of Gov't Employees, AFL-CIO*, 180 F.3d 31, 34–36 (2d Cir.1999). In particular, a *pro se* party must be advised that all assertions of material fact in the movants' affidavits and other papers will be taken as true by the district court unless the *pro se* litigant contradicts those factual assertions in one or more affidavits made on personal knowledge containing facts that would be admissible in evidence, or by submitting other materials as provided in Rule 56(e) of the Federal Rules of Civil Procedure. *See McPherson v. Coombe*, 174 F.3d 276, 281 (2d Cir.1999). Accordingly, the litigant's affidavits should “raise a genuine issue of fact as to every material element of the claim [and defense] and thereby preserve the case for trial.” *Id.* Should issues of genuine material fact be raised, they will be evaluated

by a factfinder at trial. *See Vital*, 168 F.3d at 621.

*4 Before assessing the merits of the present defendants' exhaustion defense, the Court notes that one purpose of the administrative exhaustion requirement is to help prisons address those prisoners' concerns which are best handled at the administrative level. *See Cruz*, 1999 WL 557519, at *8 (“[A] requirement that administrative remedies first be exhausted gives the prison an opportunity to halt violative practices and take ameliorative steps to mitigate damages.” (citations omitted)). Such procedures may help avoid extensive litigation. *Id.* at *4 (noting testimony in PLRA legislative history which stated that “grievance procedures at the prison level could eliminate much litigation at the district court level” (citation omitted)). For example, in this case, it appears that the prison's medical officers were prepared to address the plaintiff's concerns by placing him in a weight-loss program, but for some reason not evident in the present record, failed to do so. While the Court does not express an opinion as to the merits of the plaintiff's case, it does advise the parties that its initial assessment of this action leads it to believe that the plaintiff's concerns can be addressed through the prompt and direct action of prison authorities, and without the full litigation of this action. Accordingly, the Court urges the defendants to assess carefully the underlying medical and protection concerns raised by the plaintiff and determine what, if any, action prison authorities should take before this litigation proceeds further.

Upon the Court's initial review of Howard's complaint, it cannot readily dismiss the

complaint on the ground that it is frivolous, malicious, or otherwise without merit; accordingly, the Court concludes that it is most efficacious to evaluate the defendants' exhaustion defense. However, the complaint and the parties' submissions do not explain the nature of the grievance procedures available to Howard, and do not provide sufficient evidence upon which the Court may determine whether Howard exhausted his administrative remedies. Should the parties be unable to resolve this matter among themselves without the further involvement by the Court, the Court will require additional submissions in order to decide the exhaustion issue.

The Court puts the plaintiff on the following specific notice:

The Court exercises its inherent power to manage this case and converts the defendants' motion to dismiss on the ground of exhaustion to a motion for summary judgment pursuant to **Rule 56 of the Federal Rules of Civil Procedure**. This means that the Court may decide this issue without a trial, based on written materials, submitted in support of the motion. THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT OPPOSE THIS MOTION by filing your own sworn statement or other papers in opposition as required by **Rule 56(e)**. An affidavit is a sworn statement of fact based on personal knowledge that would be admissible in evidence at trial. The full text of **Rule 56** is enclosed with this decision.

*5 In short, **Rule 56** provides that you may NOT oppose summary judgment simply by relying upon the allegations in

your complaint. Rather, you must submit evidence, such as witness statements or documents, countering the facts asserted by the defendant and raising issues of fact for trial. Any witness statements, which may include your own statements, must be in the form of affidavits. You may submit affidavits that were prepared specifically in response to the defendants' motion for summary judgment.

Any issue of fact that you wish to raise in opposition to the motion for summary judgment must be supported by affidavits or by other documentary evidence contradicting the facts asserted by the defendant. If you do not respond to the motion for summary judgment on time with affidavits or documentary evidence contradicting the facts asserted by the defendant, the Court may accept the defendants' factual assertions as true. Judgment may then be entered in defendants' favor without a trial.

CONCLUSION

The Court orders that: 1) within forty-five days of the date of this order, the defendants are to submit documentary evidence and a memorandum of law as to the nature of the grievance procedures that were available to Howard, and the extent to which the defendants claim he failed to comply with those procedures; and 2) within forty-five days of the date the defendants' submissions are filed, the plaintiff is to respond, in accordance with the express notice set forth above. Pending further evaluation of the exhaustion issue, the

remainder of the defendants' motion is held in abeyance.

SO ORDERED.

Rule 56 Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

*6 (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required, Supporting and and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine

issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

All Citations

Not Reported in F.Supp.2d, 1999 WL 1288679

Footnotes

- 1 The PLRA allows the Court to dismiss the complaint on any of these grounds without requiring administrative exhaustion. See *42 U.S.C. § 1997e(c)(2); Jenkins v. Haubert*, 179 F.3d 19, 23 (2d Cir.1999).
- 2 The Court may also dismiss such a complaint on its own motion if the prisoner has failed to exhaust his or her administrative remedies. See *Snider v. Melindez*, 97–2803, __ F.3d __, 1999 WL 1114693, at *4 (2d Cir. Dec. 8, 1999) (“In view of Section 1997e(a)’s command ..., we can perceive no reason why a court should be prohibited from dismissing actions in violation of this mandate on its own motion.”). If the Court moves to dismiss, it would likely give the prisoner/plaintiff an opportunity to respond. See *Bazrowx v. Scott*, 136 F.3d 1053, 1054–55 (5th Cir.1998) (a district court erred in failing to give plaintiff notice of the court’s intention to dismiss his suit pursuant to *42 U.S.C. § 1997e(c)*, but error was harmless because dismissal was without prejudice); see also *Lugo v. Keane*, 15 F.3d 29, 30–32 (2d Cir.1994) (as a general rule, plaintiff must be given notice of court’s motion to dismiss).

2018 WL 7199494
Only the Westlaw citation
is currently available.

United States District Court, N.D. New York.

Lamont GOUGH, Plaintiff,
v.

Sergeant MORRIS, Sergeant Davidson,
John Doe Correctional Officer 1, John
Doe Correctional Officer 2, and John
Doe Correctional Officer 3, Defendants.

9:16-CV-1107 (GTS/DJS)

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Signed 12/14/2018

Attorneys and Law Firms

LAMONT GOUGH, Plaintiff, Pro Se, 13-A-0134, Coxsackie Correctional Facility, Box 999, Coxsackie, New York 12051-099.

BARBARA D. UNDERWOOD, Attorney General of the State of New York, OF COUNSEL: WILLIAM A. SCOTT, ESQ., The Capitol, Albany, New York 12224, Attorney for Defendants.

REPORT-RECOMMENDATION and ORDER

DANIEL J. STEWART, United States Magistrate Judge

*¹ On September 9, 2016, *pro se* Plaintiff Lamont Gough commenced this action pursuant to 42 U.S.C. § 1983, asserting claims arising from his confinement at Coxsackie Correctional Facility (“Coxsackie C.F.”). Dkt.

No. 1, Compl. Plaintiff has named two Defendants, Sergeant Davidson and Sergeant Morris, and three John Doe Defendants who are purported to be officers at Coxsackie C.F. Following initial review by the District Court, Plaintiff's First Amendment retaliation claim against Defendant Morris, Eighth Amendment excessive force claim against Defendant Morris, and Eighth Amendment failure to intervene claim against Defendant Davidson and the three John Does survive. Dkt. No. 9. Specifically, Plaintiff contends that in retaliation for filing a grievance, he was assaulted by Defendant Morris while Defendant Davidson witnessed and did not intervene. Compl.

Presently before this Court is the Motion for Summary Judgment of Defendants Davidson and Morris, which Plaintiff opposes and to which Defendants have filed a reply. Dkt. No. 47, Defs.' Mot. Summ. J.; Dkt. No. 49, Pl.'s Opp.; Dkt. No. 50, Defs.' Reply. Defendants contend that Plaintiff failed to exhaust his administrative remedies, and that his Complaint should therefore be dismissed. Dkt. No. 47-13, Def.'s Mem. of Law. The Court finds that Defendants have established that Plaintiff failed to exhaust his administrative remedies and therefore recommends that the Motion be **granted**. In addition, as discussed below, the Court recommends that Plaintiff's claims against the still unidentified Defendants be **dismissed sua sponte**.

I. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), summary judgment is appropriate only

where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The moving party bears the burden to demonstrate through “pleadings, depositions, answers to interrogatories, and admissions on file, together with [] affidavits, if any,” that there is no genuine issue of material fact. *F.D.I.C. v. Giannmettei*, 34 F.3d 51, 54 (2d Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

To defeat a motion for summary judgment, the non-movant must set out specific facts showing that there is a genuine issue for trial, and cannot rest merely on allegations or denials of the facts submitted by the movant. **FED. R. CIV. P. 56(c)**; see also *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003) (“Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case.”); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994). To that end, sworn statements are “more than mere conclusory allegations subject to disregard ... they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion” and the credibility of such statements is better left to a trier of fact. *Scott v. Coughlin*, 344 F.3d at 289 (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983) and *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995)).

*2 When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Nora Beverages, Inc. v. Perrier Group of Am., Inc.*, 164 F.3d

736, 742 (2d Cir. 1998). “[T]he trial court’s task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.” *Gallo v. Prudential Residential Servs., Ltd. P’ship*, 22 F.3d 1219, 1224 (2d Cir. 1994). Furthermore, where a party is proceeding *pro se*, the court must “read his supporting papers liberally, and [] interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994); accord, *Soto v. Walker*, 44 F.3d 169, 173 (2d Cir. 1995). Nonetheless, summary judgment is appropriate “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II. EXHAUSTION

A. Exhaustion Procedure

The Prison Litigation Reform Act (“PLRA”) provides, in pertinent part, that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” **42 U.S.C. § 1997e(a)**. The Supreme Court has held that “the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes,

and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (citation omitted). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. *Id.* at 524; *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (stating that the mandatory language of § 1997e(a) forecloses judicial discretion to craft exceptions to the requirement). Furthermore, § 1997e(a) requires “proper exhaustion,” which means using all steps of the administrative process and complying with “deadlines and other critical procedural rules.” *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). The defendant bears the burden of proving that the administrative remedies available to the plaintiff were not exhausted prior to the initiation of a civil action. *Howard v. Goord*, 1999 WL 1288679, at *3 (E.D.N.Y. Dec. 28, 1999).¹

In New York, the administrative remedies consist of a three-step Inmate Grievance Program (“IGP”). First, a grievance is submitted to the Inmate Grievance Resolution Committee (“IGRC”), a committee comprised of both inmates and facility employees. **N.Y. COMP. CODES R. & REGS.** tit. 7, § 701.5(b). An inmate must submit a grievance “within 21 calendar days of the alleged occurrence.” *Id.* at § 701.5(a). An inmate may request an extension of the time limit within forty-five days of the date of the alleged occurrence. *Id.* at § 701.6(g). The IGRC reviews and investigates the formal complaint and then issues a written determination. *Id.* at § 701.5(b). Second, upon appeal of the IGRC decision, the superintendent of the facility reviews the IGRC’s determination and issues a decision. *Id.* at § 701.5(c). Finally, upon appeal of the superintendent’s decision, the Central Office

Review Committee (“CORC”) makes the final administrative determination. *Id.* at § 701.5(d). Only upon exhaustion of all three levels of review may a prisoner seek relief in federal court. *Bridgeforth v. Bartlett*, 686 F. Supp. 2d 238, 239 (W.D.N.Y. 2010) (citing, *inter alia*, *Porter v. Nussle*, 534 U.S. at 524); *see also Neal v. Goord*, 267 F.3d 116, 121 (2d Cir. 2001), *overruled on other grounds by Porter v. Nussle*, 534 U.S. 516.

B. Plaintiff's Failure to Exhaust Administrative Remedies

*3 At the time of the relevant events of this action, Coxsackie C.F. had a grievance program to which inmates had full access. Dkt. No. 47-3, Decl. of Rachel Seguin, at ¶¶ 4-12; Dkt. No. 47-4, Seguin Decl., Ex. A.

There are no recorded grievances filed by Plaintiff regarding any alleged assault or use of excessive force claims against Defendant Morris, an alleged failure to intervene claim against Defendant Davidson, or a retaliation claim against Defendant Morris. *See* Seguin Decl. at ¶¶ 20-23. While Plaintiff was housed at Coxsackie, Plaintiff filed five grievances. Dkt. No. 47-8, Decl. of Tisha Surprenant, ¶ 10; Dkt. No. 47-9, Surprenant Decl., Ex. A. Three of those five grievances were filed before the events at issue in this lawsuit, and so Plaintiff could not have exhausted his administrative remedies utilizing these grievances. Surprenant Decl. at ¶ 11; Surprenant Decl., Ex. A (reflecting filing dates of February 28, 2014, April 23, 2014, and September 10, 2014). Plaintiff filed two grievances at Coxsackie after the date of the alleged incident. *Id.* Those

grievances are not related to the events at issue in the Complaint. The first, “Unprofessional Remarks,” was filed on April 22, 2015, four months after the events at issue in the Complaint, and is dated March 20, 2015, nearly three months after the events at issue. Dkt. No. 47-7, Seguin Decl., Ex. D. This grievance alleged that Plaintiff was being verbally harassed, that Plaintiff's mail was being violated, and that he was being called a rapist; that grievance only named Counselor Iarusso. *Id.* While this grievance has some similar allegations as does Plaintiff's claim, it has to do with Counselor Iarusso “going around the jail” talking about Plaintiff, and other verbal harassment which was allegedly ongoing, unlike the verbal and physical alteration alleged in the Complaint. It does not provide any allegations regarding the physical assault and is not otherwise particularized to the January 22, 2015 incident. The other grievance filed after the alleged assault, “Sneakers Not Mailed Out,” pertained to sneakers that Plaintiff believed were in the package room. Dkt. No. 47-6, Seguin Decl., Ex. C. This grievance is not relevant to the events at issue in the Complaint and did not name any of the Defendants in this case. As such, neither of these grievances could have been used to properly exhaust Plaintiff's claims.

In his deposition, Plaintiff claimed that he did file a grievance regarding harassment that went to the superintendent. Dkt. No. 47-11, Decl. of Louis Jim, Ex. A, Pl.'s Dep., pp. 20-23. Such harassment grievances are subject to expedited review, which provides for first level review by the superintendent, and a subsequent appeal to the Central Office Review Committee to have fully exhausted the grievance. N.Y.

COMP. CODES R. & REGS. tit. 7, § 701.8. While Plaintiff claims that he did appeal the superintendent's response to CORC, there is no evidence in Plaintiff's opposition, or any other submission, of either the harassment grievance itself, the superintendent's response, or Plaintiff's alleged appeal to CORC. Pl.'s Dep. at pp. 21-22. Indeed, Plaintiff testified at his deposition that he never received a response from CORC, and that he did not write a grievance complaining that he did not receive a response. *Id.* at p. 39. Plaintiff's “vague and conclusory allegations that he filed other grievances ... do not, in light of the documentation that Defendants have provided about Plaintiff's grievance history, create a factual dispute material to the issue of whether Plaintiff exhausted his administrative remedies.” *Toliver v. Stefinik*, 2016 WL 3349316, at *6 (N.D.N.Y. June 15, 2016). As such, Plaintiff failed to exhaust his administrative remedies relative to the complaint.

C. Whether Plaintiff's Failure to Exhaust Administrative Remedies May be Excused

*4 A prisoner's failure to exhaust administrative remedies may nonetheless be excused if remedies were unavailable to the inmate. *Ross v. Blake*, 136 S. Ct. at 1858. As the Supreme Court stated in that case, “[a]n inmate ... must exhaust available remedies, but need not exhaust unavailable ones.” *Id.* The Court provided three potential circumstances in which administrative remedies may be unavailable: (1) where the administrative procedure technically exists but operates as a “dead end – with officers unable or consistently

unwilling to provide any relief to aggrieved inmates"; (2) where the administrative scheme is "so opaque that it becomes, practically speaking, incapable of use"; and (3) where prison administrators "thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1859-60.

In his opposition papers, Plaintiff claims that (1) he followed the proper procedures and was ignored; (2) his mail was tampered with; (3) he feared retaliation, and (4) he grieved through informal means. *See* Compl. at p. 13; ² Dkt. No. 1-1, Exs. to Compl. at pp. 18-21; Pl.'s Opp. at pp. 2-5. None of these allegations, however, are sufficient to raise an issue of material fact as to the availability of administrative remedies that would excuse his failure to exhaust.

First, in his Complaint, Plaintiff describes frustration with Coxsackie C.F.'s grievance process, stating that he followed the proper procedures and that he did not get any responses and that he was "basically ignored." Exs. to Compl. at p. 20. In his letters to correctional facility staff, Plaintiff specifically describes issues with Coxsackie C.F.'s mail process, stating that the mail he attempts to send is not properly delivered and that he believes his mail is being tampered with. Seguin Decl., Ex. C. at p. 21; Seguin Decl., Ex. D at p. 6. Plaintiff also makes loose claims that his paperwork gets lost. Seguin Decl., Ex. D at p. 6. Plaintiff attaches to his Opposition a written request dated February 15th, 2015, in which Plaintiff asked for his grievances back and described his frustration regarding lack of responses and allegedly missing paperwork. Pl.'s Opp. at p. 6. However, it is entirely unclear

to what this refers; it is not evident that this relates to the claims in Plaintiff's Complaint, and Plaintiff does not demonstrate that it does.

In his general allegations regarding the mail and being ignored, Plaintiff fails to provide any facts regarding when he tried to file administrative grievances or appeals regarding the alleged assault. For example, he offers no evidence about when or to whom he allegedly provided grievances regarding the incident at issue in this case. Nor does he provide copies of the any alleged grievances regarding this incident. "Courts have consistently held [] that an inmate's general claim that his grievance was lost or destroyed does not excuse the exhaustion requirement." *Rosado v. Fesetto*, 2010 WL 3808813, at *7 (N.D.N.Y. Aug. 4, 2010); *Rodriguez v. Cross*, 2017 WL 2791063, at *7 (N.D.N.Y. May 9, 2017) ("Courts in this Circuit have continuously held that mere contentions or speculation of grievances being misplaced by officers do not create a genuine issue of material fact when there is no evidence to support the allegations."); *Artis v. Dishaw*, 2016 WL 11266599, n.13 (N.D.N.Y. Sept. 12, 2016) (finding that plaintiff's failure to exhaust was not excusable, in part because, while the plaintiff "state[d] that some grievances were destroyed, but he has not submitted any copies of these grievances, nor does he specify when he attempted to file them.").

*5 Further, even if Plaintiff did believe that his attempts at filing a grievance regarding his assault would be ineffective, this does not excuse his failure to do so. The case law is clear that "[p]risoners are required to exhaust their administrative remedies 'even if they believe that administrative remedies

would be ineffective or futile.’ ” *Harrison v. Goord*, 2009 WL 1605770, at *4 (S.D.N.Y. June 9, 2009); *see also Woodford v. Ngo*, 548 U.S. at 89-90 (stating that “exhaustion requirements are designed to deal with parties who do not want to exhaust,” including those who “conclude—correctly or incorrectly—that exhaustion is not efficient in that party’s particular case.”).

Plaintiff asserts in his Complaint and deposition that he is being consistently harassed and intimidated by officers at Coxsackie C.F. Exs. to Compl. at p. 20; Pl.’s Dep. at p. 39. Plaintiff also stated in his deposition that he stopped writing grievances because he had been threatened. Pl.’s Dep. at p. 39; *see also* Exs. to Compl. at p. 36. Under *Ross*, threats or other intimidation by prison employees may render administrative remedies unavailable. *Ross v. Blake*, 136 S. Ct. at 1860, n.3. However, on this record such a contention is inconsistent with Plaintiff’s assertions that he did properly grieve the assault, and with Plaintiff’s filing of grievances after that time. *See, e.g.*, Pl.’s Opp. at ¶ 20; Seguin Decl. Ex. B; *Crawford v. Baltazar*, 2018 WL 2041711, at *6 (S.D.N.Y. Apr. 30, 2018).

Instead, Plaintiff’s allegations amount to a “generalized fear of retaliation” without allegations of any specific threats or other actions that would prevent him from filing a grievance regarding the alleged assault. Such allegations are insufficient to excuse a failure to exhaust. *See Brown v. Napoli*, 687 F. Supp. 2d 295, 297 (W.D.N.Y. 2009) (“[P]laintiff’s mere allegation of a generalized fear of retaliation is insufficient to excuse his failure to file a grievance[.]”); *see also Rodriguez v. Cty. of*

Suffolk, 2014 WL 3531897, at *5 (E.D.N.Y. June 30, 2014) (“Courts tend to find mere ‘generalized fear’ when no actual threat was made.”) (internal citation omitted).

Plaintiff also appears to contend that he satisfied the exhaustion requirement via informal means, as in his Complaint he states that he was interviewed by the Inspector General. Compl. at p. 13. However, the described interactions, indicating that prison officials were likely aware of the nature of Plaintiff’s complaint, are insufficient to constitute “proper exhaustion.” *See Davis v. Doe*, 2017 WL 8640829, at 3 (N.D.N.Y. Dec. 29, 2017). *See also Macias v. Zenk*, 495 F.3d 37,44 (2d Cir. 2007) (“Alerting the prison officials as to the nature of the wrong for which redress is sought, does not constitute ‘proper exhaustion.’ ”) (internal citation omitted). “Regardless of whether ... informal complaints put the prison officials on notice of his grievance ‘in a substantive sense,’ ... to satisfy the PLRA a prisoner must also *procedurally* exhaust his available administrative remedies.” *Id.* at 43.

Plaintiff has not provided any evidence that could satisfy any of the three circumstances that could excuse failing to exhaust under *Ross*. Plaintiff does not demonstrate that the grievance procedure operated as a dead end in that officers were unable or unwilling to provide relief, or that the administrative scheme was so opaque that it was incapable of use. *Ross v. Blake*, 136 S. Ct. at 1853-54. Nor does Plaintiff sufficiently allege that prison officials “ ‘misled, threatened, or otherwise deterred’ him from utilizing the IGP.” *Hooks v. Howard*,

2010 WL 1235236, at *7 (N.D.N.Y. Mar. 30, 2010).

*6 Accordingly, for the foregoing reasons, the Court finds that Plaintiff has not established an issue of material fact as to the availability of administrative remedies. The Court therefore recommends that Defendants' Motion be **granted** based upon Plaintiff's failure to exhaust.

III. JOHN DOE DEFENDANTS

As to the still unidentified John Doe Defendants, I recommend these Defendants be **dismissed** for a number of reasons: (1) Plaintiff's failure to comply with a court order under Fed. R. Civ. P. 16(f);³ (2) Plaintiff's failure to prosecute under Fed. R. Civ. P. 41(b) and N.D.N.Y.L.R. 41.2(a); and (3) Plaintiff's failure to serve within 90 days under Fed. R. Civ. P. 4(m). I also note that even if Plaintiff had properly named the John Doe Defendants, it would be of no consequence because, as noted above, Plaintiff has failed to exhaust his administrative remedies.

IV. CONCLUSION

For the reasons stated herein, it is hereby

RECOMMENDED, that Defendants' Motion for Summary Judgment (Dkt. No. 47) be **GRANTED** and that Plaintiff's claims be **DISMISSED**; and it is further

RECOMMENDED, that Plaintiff's claims against the John Doe Defendants be **DISMISSED sua sponte**; and it is further

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14)⁴ days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)); see also 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72 & 6(a).

All Citations

Not Reported in Fed. Supp., 2018 WL 7199494

Footnotes

1 Exhaustion of administrative remedies is an affirmative defense which must be raised by the defendant. See *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999).

The Named Defendants properly raised the affirmative defense in their Answer to the Complaint. Dkt. No. 18 at ¶ 14.

- 2 When citing to Plaintiff's submissions, the Court will cite to the pagination assigned by the Court's Case Management Electronic Case Files ("CM/ECF") System.
- 3 The District Judge ordered Plaintiff to "take reasonable steps through discovery to ascertain their identities," and "advised that any unnamed individual is not timely served, the action may be dismissed against that defendant." Dkt. No. 9 at p. 12; see also Dkt. No. 13 (Decision and Order providing guidance on identifying the John Doe Defendants). Discovery ended in this matter on January 31, 2018. See Dkt. No. 41.
- 4 If you are proceeding *pro se* and are served with this Order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the order was mailed to you to serve and file objections. [FED. R. CIV. P. 6\(d\)](#). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. [FED. R. CIV. P. 6\(a\)\(1\)\(C\)](#).

2019 WL 5191506
Only the Westlaw citation
is currently available.

United States District Court, N.D. New York.

Bryant GIBBS, Plaintiff,
v.
Christopher GADWAY, Defendant.

9:19-CV-281 (GTS/DJS)

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Signed 10/15/2019

Attorneys and Law Firms

BRYANT GIBBS, 11-R-0220, Plaintiff, Pro Se,
Five Points Correctional Facility, Caller Box
119, Romulus, New York 14541.

HON. LETITIA JAMES, Attorney General
of the State of New York, OF COUNSEL:
NICHOLAS L. ZAPP, ESQ., Assistant
Attorney General, Attorney for Defendant, The
Capitol, Albany, New York 12224.

REPORT-RECOMMENDATION **and ORDER**

DANIEL J. STEWART, United States
Magistrate Judge

***1** Plaintiff, presently an inmate in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”), brings this *pro se* action pursuant to **42 U.S.C. § 1983**, alleging the violation of his constitutional rights. Dkt. No. 1, Compl. Following initial review of the Complaint under **28 U.S.C. §§ 1915(e)** and **1915A**,

all claims other than an Eighth Amendment excessive force claim against Defendant Gadway were dismissed. Dkt. No. 7. In lieu of answering the Complaint, Defendant has moved for summary judgment based on Plaintiff’s alleged failure to exhaust his administrative remedies. Dkt. No. 14. Plaintiff opposes the Motion. Dkt. No. 17 (“Pl.’s Opp.”). Defendant has filed a Reply. Dkt. No. 18. For the reasons which follow, the Court recommends that the Motion for Summary Judgment be granted.

I. BACKGROUND

Plaintiff alleges that he was assaulted by Defendant Gadway in June 2016. Compl. at p. 2. That same month Plaintiff filed an administrative grievance making this same allegation. Dkt. No. 14-3, Declaration of Christine Gregory (“Gregory Decl.”) at Ex. B. Given that the grievance concerned alleged staff misconduct the grievance was forwarded directly to the facility Superintendent. Gregory Decl. at ¶ 12. On July 16, 2016, the Superintendent responded to the grievance. *Id.* at ¶ 12 & Ex. C. Plaintiff alleges that he then appealed the Superintendent’s determination to DOCCS’ Central Office Review Committee. Pl.’s Opp. at pp. 4-5. DOCCS has no record of any such appeal. Gregory Decl. at ¶ 15; Dkt. No. 14-4, Declaration of Rachael Seguin (“Seguin Decl.”), ¶ 9 & Ex. A.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Pursuant to FED. R. CIV. P. 56(a), summary judgment is appropriate only where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The moving party bears the burden to demonstrate through “pleadings, depositions, answers to interrogatories, and admissions on file, together with [] affidavits, if any,” that there is no genuine issue of material fact. *F.D.I.C. v. Giannmettei*, 34 F.3d 51, 54 (2d Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

To defeat a motion for summary judgment, the non-movant must set out specific facts showing that there is a genuine issue for trial and cannot rest merely on allegations or denials of the facts submitted by the movant. FED. R. CIV. P. 56(c); see also *Scott v. Coughlin*, 344 F.3d 282, 287 (2d Cir. 2003) (“Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case.”); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 525-26 (2d Cir. 1994). To that end, sworn statements are “more than mere conclusory allegations subject to disregard ... they are specific and detailed allegations of fact, made under penalty of perjury, and should be treated as evidence in deciding a summary judgment motion” and the credibility of such statements is better left to a trier of fact. *Scott v. Coughlin*, 344 F.3d at 289 (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983) and *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995)).

*2 When considering a motion for summary judgment, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Nora Beverages*,

Inc. v. Perrier Group of Am., Inc., 164 F.3d 736, 742 (2d Cir. 1998). “[T]he trial court’s task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.” *Gallo v. Prudential Residential Servs., Ltd. P’ship*, 22 F.3d 1219, 1224 (2d Cir. 1994). Furthermore, where a party is proceeding *pro se*, the court must “read [his or her] supporting papers liberally, and ... interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994); see also *Soto v. Walker*, 44 F.3d 169, 173 (2d Cir. 1995). Nonetheless, summary judgment is appropriate “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. DISCUSSION

Defendant seeks summary judgment on the ground that Plaintiff failed to exhaust his available administrative remedies by failing to appeal the facility-level denial of his grievance. Dkt. No. 14-1, Def.’s Mem. of Law at pp. 6-7. Plaintiff counters that he attempted to exhaust his administrative remedies and that, even if he did not, he should be excused from the exhaustion requirement. Pl.’s Opp. at pp. 4-5.

A. Exhaustion Procedure

The Prison Litigation Reform Act (“PLRA”) provides, in pertinent part, that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” [42 U.S.C. § 1997e\(a\)](#). The Supreme Court has held that “the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (citation omitted). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. *Id.* at 524; *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (stating that the mandatory language of § 1997e(a) forecloses judicial discretion to craft exceptions to the requirement). Furthermore, § 1997e(a) requires “proper exhaustion,” which means using all steps of the administrative process and complying with “deadlines and other critical procedural rules.” *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). The defendant bears the burden of proving that the administrative remedies available to the plaintiff were not exhausted prior to the initiation of a civil action. *Howard v. Goord*, 1999 WL 1288679, at *3 (E.D.N.Y. Dec. 28, 1999).

In New York, the administrative remedies consist of a three-step Inmate Grievance Program (“IGP”). First, a grievance is submitted to the Inmate Grievance Resolution Committee (“IGRC”), a committee comprised of both inmates and facility employees. [N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5\(b\)](#). An inmate must submit a grievance “within

21 calendar days of the alleged occurrence.” *Id.* at § 701.5(a). An inmate may request an extension of the time limit within forty-five days of the date of the alleged occurrence. *Id.* at § 701.6(g). The IGRC reviews and investigates the formal complaint and then issues a written determination. *Id.* at § 701.5(b). Second, upon appeal of the IGRC decision, the superintendent of the facility reviews the IGRC’s determination and issues a decision. *Id.* at § 701.5(c). Finally, upon appeal of the superintendent’s decision, the Central Office Review Committee (“CORC”) makes the final administrative determination. *Id.* at § 701.5(d). Only upon exhaustion of all three levels of review may a prisoner seek relief in federal court. *Bridgeforth v. Bartlett*, 686 F. Supp. 2d 238, 239 (W.D.N.Y. 2010) (citing, *inter alia*, *Porter v. Nussle*, 534 U.S. at 524); see also *Neal v. Goord*, 267 F.3d 116, 121 (2d Cir. 2001), overruled on other grounds by *Porter v. Nussle*, 534 U.S. 516.

***3** An expedited procedure exists for grievances regarding alleged harassment; this procedure also requires the grievant receive a response from CORC in order to exhaust. **7 N.Y.C.R.R. § 701.8.** Pursuant to this expedited procedure, the inmate may first report the incident to the employee’s immediate supervisor. *Id.* at § 701.8(a). The inmate’s allegations are then given a grievance number and the superintendent (or his designee) must promptly decide whether the grievance, if true, would represent a bona fide case of harassment. *Id.* at §§ 701.8(b) & (c).

B. Plaintiff's Failure to Exhaust Administrative Remedies

1. Whether Plaintiff Actually Filed a Grievance

The record before the Court establishes that while DOCCS has a record of Plaintiff's initial grievance, there is no record of any appeal of the decision on that grievance to CORC. Gregory Decl. at ¶ 15; Seguin Decl., ¶ 9 & Ex. A. "Included within the IGP's exhaustion requirement is the prerequisite that the inmate file an appeal with CORC and receive a response from CORC prior to filing a federal lawsuit." *White v. Drake*, 2011 WL 4478988, at *3 (N.D.N.Y. Aug. 11, 2011), *report and recommendation adopted*, 2011 WL 4478921 (N.D.N.Y. Sept. 26, 2011); *see also Berkley v. Ware*, 2018 WL 3736791, at *5 (N.D.N.Y. July 6, 2018), *report and recommendation adopted*, 2018 WL 3730173 (N.D.N.Y. Aug. 6, 2018) (citing cases).

Plaintiff makes a purely conclusory allegation that he appealed the grievance denial to CORC. Pl.'s Opp. at p. 4 ("Plaintiff appealed to the CORC").¹ Significantly, Plaintiff has not provided a copy of the grievance appeal or even asserted on what date he filed the appeal. *Gough v. Morris*, 2018 WL 7199494, at *3 (N.D.N.Y. Dec. 14, 2018), *report and recommendation adopted*, 2019 WL 416150 (N.D.N.Y. Feb. 1, 2019) ("there is no evidence in Plaintiff's opposition, or any other submission, of ... Plaintiff's alleged appeal to CORC."). In light of the documented proof that no such appeal was filed, such a conclusory

statement is insufficient to create a material question of fact on this Motion. *Toliver v. Stefinik*, 2016 WL 3349316, at *6 (N.D.N.Y. June 15, 2016); *Richardson v. Eberth*, 2016 WL 1271078, at *4 (W.D.N.Y. Mar. 29, 2016).

Under these circumstances, the record before the Court establishes that Plaintiff did not fully appeal his grievance regarding the alleged assault by Gadway. He, therefore, did not exhaust his administrative remedies.

2. Whether Plaintiff's Failure to Exhaust Administrative Remedies May be Excused

A prisoner's failure to exhaust administrative remedies may nonetheless be excused if remedies were unavailable to the inmate. *Ross v. Blake*, 136 S. Ct. at 1858. As the Supreme Court stated in *Ross*, "[a]n inmate ... must exhaust available remedies, but need not exhaust unavailable ones." *Id.* The Court provided three potential circumstances in which administrative remedies may be unavailable: (1) where the administrative procedure technically exists but operates as a "dead end – with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) where the administrative scheme is "so opaque that it becomes, practically speaking, incapable of use"; and (3) where prison administrators "thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1859-60.

*4 Plaintiff appears to make two arguments for finding that administrative remedies were unavailable to him: the lack of guidance

in DOCCS' grievance procedure and alleged threats made against him. Pl.'s Opp. at p. 5. Neither is sufficient to defeat the pending Motion.

Plaintiff first claims that when he became aware that the appeal he claims to have filed was never received by CORC he looked to DOCCS's grievance procedure "for guidance on what to do ... and found no guidance whatsoever on what the next step would be." Pl.'s Opp. at p. 5. Relying on *Williams v. Priatno*, 829 F.3d 118 (2d Cir. 2016), he contends he should be excused from the exhaustion requirement. See Pl.'s Opp. at p. 3.

At the outset, this case presents a readily distinguishable fact pattern from that which the Second Circuit was confronted with in *Williams*. In that case, the District Court had dismissed the complaint based on lack of exhaustion because Plaintiff had not administratively appealed his grievance, even though the grievance had never been officially filed by DOCCS personnel at the correctional facility. *Williams v. Priatno*, 829 F.3d at 121. The Second Circuit reversed, finding that DOCCS' grievance procedures "do not describe a mechanism for appealing a grievance that was never filed." *Id.* at 126. On the contrary here, there is no dispute that Plaintiff filed a grievance at the facility and that he received a response. Gregory Decl., Exs. B & C. It is also clear that DOCCS regulations specifically address what should have been done in a situation such as this when an appeal has allegedly been filed, but not responded to. Specifically, the applicable regulation provides that "[i]f a grievant does not receive a copy of the written notice of receipt within 45 days

of filing an appeal, the grievant should contact the IGP supervisor in writing to confirm that the appeal was filed and transmitted to CORC." 7 N.Y.C.R.R. § 701.5(d)(3)(i). This provision provided specific guidance to Plaintiff on how to proceed - when he did not receive notice that his appeal had been received by CORC he should have contacted the facility inmate grievance staff to verify that his appeal had been received and processed. There is no evidence that Plaintiff did so here and his failure cannot provide the basis for excusing him from the exhaustion requirement. This is not a situation, as in *Williams*, where the procedure was "so opaque and confusing" that the Plaintiff could have not understood how to proceed. *Williams v. Prianto*, 829 F.3d at 126.

Finding Plaintiff's claims unexhausted is consistent with the decision in *Gizewski v. New York State Dep't of Corr. and Cnty. Supervision* which found that an inmate's claim is not exhausted if he fails to avail himself of the procedure in section 701.5(d)(3)(i). 2016 WL 3661434, at *13 (N.D.N.Y. July 5, 2016). In *Gizewski*, the record established that the plaintiff had filed an administrative appeal, but DOCCS personnel had failed to timely forward it to CORC. *Id.* at *3. Plaintiff then filed his federal lawsuit before receiving a decision on the appeal from CORC. *Id.* at *13. The Court acknowledged DOCCS' failure to properly process the appeal, but nonetheless granted judgment to defendants in part because "Plaintiff [wa]s also at fault for not taking any further action" pursuant to section 701.5. *Id.* Plaintiff here has a less compelling case than in *Gizewski* since there is no admissible evidence that he ever, in fact, filed an appeal to CORC.

*5 Plaintiff also claims that he was threatened and retaliated against by Defendant. Pl.'s Opp. at p. 5. Under *Ross*, threats or other intimidation by prison employees may render administrative remedies unavailable. *Ross v. Blake*, 136 S. Ct. at 1860, n.3. Plaintiff's allegations are entirely conclusory, however. Plaintiff's Complaint claimed he was threatened only *after* filing the grievance, Compl. at p. 1, and he makes no claim that this alleged threat impacted his ability to appeal the grievance. *McGinnis v. Crissell*, 2019 WL 4395410, at *6 (N.D.N.Y. Apr. 26, 2019), *report and recommendation adopted*, 2019 WL 3228867 (N.D.N.Y. July 18, 2019) (citing cases). There is no specific allegation made by Plaintiff at all that any retaliatory action was ever taken against him as a result of filing the grievance. Such "general and conclusory statements that he was threatened are insufficient to raise a triable issue of fact as to the unavailability of the grievance procedure because of intimidation by prison administrators." *Lewis v. Wasielewski*, 2018 WL 4732755, at *6 (W.D.N.Y. July 10, 2018), *report and recommendation adopted*, 2018 WL 4692476 (W.D.N.Y. Oct. 1, 2018) (citing cases). Plaintiff's conclusory claims, therefore, are no basis for denying summary judgment.

To the extent Plaintiff attempts to argue that his grievance appeal may have been tampered with, Pl.'s Opp. at p. 5 ("Once [inmate mail] is picked up plaintiff no longer has any control over what happens to that piece of mail."), his conclusory allegation in this regard is not sufficient to defeat summary judgment. "Courts have consistently held [] that an inmate's general claim that his grievance was lost or destroyed does not excuse the exhaustion

requirement." *Rosado v. Fesetto*, 2010 WL 3808813, at *7 (N.D.N.Y. Aug. 4, 2010); *see also Rodriguez v. Cross*, 2017 WL 2791063, at *7 (N.D.N.Y. May 9, 2017) ("Courts in this Circuit have continuously held that mere contentions or speculation of grievances being misplaced by officers do not create a genuine issue of material fact when there is no evidence to support the allegations."); *Artis v. Dishaw*, 2016 WL 11266599, n.13 (N.D.N.Y. Sept. 12, 2016) (finding that plaintiff's failure to exhaust was not excusable, in part because, while the plaintiff "state[d] that some grievances were destroyed, but he has not submitted any copies of these grievances, nor does he specify when he attempted to file them.").

Accordingly, the Court finds that Plaintiff has not established an issue of material fact as to the availability of administrative remedies. The Court therefore recommends that Defendants' Motion be **granted** based upon Plaintiff's failure to exhaust.

IV. CONCLUSION

For the reasons stated herein, it is hereby

RECOMMENDED, that Defendant's Motion for Summary Judgment (Dkt. No. 14) be **GRANTED**; and it is further

RECOMMENDED, that the Complaint be **DISMISSED**; and it is

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation and Order upon the parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89

(2d Cir. 1993) (citing *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15 (2d Cir. 1989)); see also 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72 & 6(a).

All Citations

Not Reported in Fed. Supp., 2019 WL 5191506

Footnotes

- 1 Plaintiff did not submit a sworn statement attesting to the fact that he filed an appeal. Nor did he file a response to Defendant's Statement of Material Facts. Although a *pro se* litigant is entitled to a liberal construction of his filings, see *Sykes v. Bank of America*, 723 F.3d 399, 403 (2d Cir. 2013), his *pro se* status does not relieve him of his obligation to comply with the relevant procedural rules, see *Marino v. Watts*, 2018 WL 3121612, at *1 (N.D.N.Y. Mar. 7, 2018), *report and recommendation adopted sub nom. Marino v. Schult*, 2018 WL 1578163 (N.D.N.Y. Mar. 30, 2018), aff'd, 764 Fed. Appx. 73 (2d Cir. 2019). The Court therefore will deem the facts as set forth in Defendant's Statement of Material Facts admitted, to the extent they are properly supported by the record.

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United States District Court,
N.D. New York.

Patrick GUILLORY, Plaintiff,
v.
Kurt ELLIS, et al, Defendants.
No. 9:11-CV-600 (MAD/ATB).
|
Signed Aug. 29, 2014.

Attorneys and Law Firms

Patrick Guillory, Dannemora, NY, pro se.

Office of the New York State Attorney General,
The Capitol, [Gregory J. Rodriguez](#), AAG, of
Counsel, Albany, NY, for Defendants.

MEMORANDUM— DECISION AND ORDER

[MAE A. D'AGOSTINO](#), District Judge.

I. INTRODUCTION

*1 Plaintiff, an inmate currently in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”), commenced this civil rights action, pursuant to [42 U.S.C. § 1983](#), on May 31, 2011. *See* Dkt. No. 1. The remaining claims are that Defendants violated Plaintiff’s constitutional rights under the First Amendment’s Free Exercise Clause, as well as his rights under the Religious Land Use

and Institutionalized Person’s Act (“RLUIPA”), and subsequently retaliated against him for attempting to exercise these rights by destroying Plaintiff’s mail and thus denying him access to the courts. *See* Dkt. Nos. 1, 210.

In a very thorough Report–Recommendation dated July 23, 2014, Magistrate Judge Baxter recommended that the Court grant Defendants’ motion for summary judgment and dismiss Plaintiff’s complaint in its entirety. *See* Dkt. No. 210. Specifically, Magistrate Judge Baxter first found that in relation to the December 7, 2010 incident, Defendant Ready acted within the bounds of his employment and according to the documentation before him and thus, his inadvertent denial that caused Plaintiff to miss one religious service did not substantially burden Plaintiff’s free exercise of his religion. *See id.* at 14. With regards to the March 20, 2011 incident, Magistrate Judge Baxter found that Defendant Ellis was not responsible for the shortened duration of the Purim celebration, and that while the delay may have been an inconvenience, Plaintiff was still able to participate in the service, thus satisfying the requirements of the First Amendment and RLUIPA. *See id.* at 19–20. Magistrate Judge Baxter also found that neither Defendant Ellis, nor Defendant Ready engaged in the conduct mentioned above as a way to retaliate against Plaintiff for any grievances that he had previously filed either against them or any other correctional officer. *See id.* at 39–40. Moreover, Magistrate Judge Baxter found that Defendant Kupiec did not interfere with Plaintiff’s mail as a means to either retaliate against him or to deny him access to the courts. *See id.* 35–36. Finally, Magistrate Judge Baxter found that Plaintiff failed to establish

that he suffered an adverse action as a result of Defendant Kupiec's alleged conduct. On August 4, 2014, the Court received objections to the Report–Recommendation from Plaintiff. See Dkt. No. 211.

II. DISCUSSION

A. Plaintiff's objections

In his objection to Magistrate Judge Baxter's Report–Recommendation, Plaintiff states that he objects to the Report in its entirety. See *id.* Plaintiff relays his astonishment at Magistrate Judge Baxter's choice to "excuse Def [endant] Kupiec's conduct" and at his finding that Plaintiff's position is "unfounded." See *id.* Plaintiff further objects to Magistrate Judge Baxter's Report on the grounds that he looked outside the pleadings and "only to the Defendants' Affidavits" when making his determination to grant Defendants' motion for summary judgment. See *id.*

B. Standard of review

*2 A court may grant a motion for summary judgment only if it determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the movant as a matter of law. See *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 36 (2d Cir.1994) (citations omitted). When analyzing a summary judgment motion, the court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Id.* at 36–37 (quotation and other citation omitted). Moreover, it is well-settled that a party opposing a motion for summary judgment may not simply rely on the assertions

in its pleadings. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed.R.Civ.P. 56(c)(e)).

In assessing the record to determine whether any such issues of material fact exist, the court is required to resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. See *Chambers*, 43 F.3d at 36 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2502, 2513–14, 91 L.Ed.2d 202 (1986)) (other citations omitted). Where the non-movant either does not respond to the motion or fails to dispute the movant's statement of material facts, the court may not rely solely on the moving party's Rule 56.1 statement; rather the court must be satisfied that the citations to evidence in the record support the movant's assertions. See *Giannullo v. City of N.Y.*, 322 F.3d 139, 143 n. 5 (2d Cir.2003) (holding that not verifying in the record the assertions in the motion for summary judgment "would derogate the truth-finding functions of the judicial process by substituting convenience for facts").

"[I]n a *pro se* case, the court must view the submissions by a more lenient standard than that accorded to 'formal pleadings drafted by lawyers.' " *Govan v. Campbell*, 289 F.Supp.2d 289, 295 (N.D.N.Y.2007) (quoting *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)) (other citations omitted). The Second Circuit has opined that the court is obligated to "make reasonable allowances to protect *pro se* litigants" from inadvertently forfeiting legal rights merely because they lack a legal education. *Govan v. Campbell*, 289 F.Supp.2d 289, 295 (N.D.N.Y.2007) (quoting *Traguth v. Zuck*, 710 F.2d 90,

95 (2d Cir.1983)). “However, this does not mean that a *pro se* litigant is excused from following the procedural requirements of summary judgment. *See id.* at 295 (citing *Showers v. Eastmond*, 00 CIV. 3725, 2001 WL 527484, *1 (S.D.N.Y. May 16, 2001)). Specifically, “a *pro se* party’s ‘bald assertion,’ completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment.” *Lee v. Coughlin*, 902 F.Supp. 424, 429 (S.D.N.Y.1995) (citing *Cary v. Crescenzi*, 923 F.2d 18, 21 (2d Cir.1991)).

When a party files specific objections to a magistrate judge’s report-recommendation, the district court makes a “*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1). However, when a party files “[g]eneral or conclusory objections or objections which merely recite the same arguments [that he presented] to the magistrate judge,” the court reviews those recommendations for clear error. *O’Diah v. Mawhir*, No. 9:08-CV-322, 2011 WL 933846, *1 (N.D.N.Y. Mar. 16, 2011) (citations and footnote omitted). After the appropriate review, “the court may accept, reject, or modify, in whole or in part, the findings or recommendation made by the magistrate judge.” 28 U.S.C. § 636(b)(1).

C. Application

*3 In the present matter, although Plaintiff has filed objections to Magistrate Judge Baxter’s Report–Recommendation, the objections that are given are mostly conclusory and “merely recite the same arguments” that were originally presented to Magistrate Judge Baxter. *See O’Diah*, 2011 WL 933846, at *1; *see generally*

Dkt. No. 211. Moreover, some of the objections that Plaintiff makes are of an accusatory nature, in that he charges Magistrate Judge Baxter with excusing the behavior of Defendant Kupiec based on her race, and supporting “the Defendants [r]eckless lies.” *See* Dkt. No. 211 at 1 (“I’m sure if Kupiec was black you would have treated her like all of the blacks who appear before you who are ‘ignorant of the law’ ”). Nearly all of Plaintiff’s “objections” lack the specificity needed to make a *de novo* determination. In light of his *pro se* status, however, the Court will address the arguments raised.

Plaintiff argues that Magistrate Judge Baxter improperly considered disputed facts in rendering his recommendation. *See* Dkt. No. 211 at 3. Having reviewed the Report–Recommendation, the Court finds that Magistrate Judge Baxter correctly relied only on undisputed facts in rendering his determination or construed any disputed facts in Plaintiff’s favor in finding that Plaintiff’s allegations were insufficient as a matter of law to support his claims. *See, e.g.*, Dkt. No. 210 at 39 (finding that “neither the action allegedly taken by defendant Ready, nor the action allegedly taken by defendant Ellis rises to the level of an ‘adverse action’ under the case law”). Further, contrary to Plaintiff’s allegations, Defendants’ motion for summary judgment was properly supported by the record, including affidavits and deposition transcripts.

Finally, contrary to Plaintiff’s assertions, Magistrate Judge Baxter correctly determined that Defendant Boll was not personally involved in the alleged conduct. The letter to which Plaintiff refers clearly establishes

that Defendant Boll did not conduct an investigation into the underlying subject of Plaintiff's grievance, but was merely conducting an "investigation" into the status of Plaintiff's grievance and a reminder that the "Inmate Grievance Program was instituted to handle issues such as yours." Dkt. No. 202–6 at Exhibit "A." Defendant Boll then stated that "[t]he CORC will conduct a thorough investigation to assure that your rights are observed and your issues are addressed. If any corrective action is needed, you will be notified. As your appeal to the CORC is pending, it is recommended that you await the decision." *Id.* Magistrate Judge Baxter correctly determined that Defendant Boll's response to Plaintiff was insufficient to establish her personal involvement. *See Rivera v. Fischer, 655 F.Supp.2d 235, 238 (W.D.N.Y.2009).*

The Court has thoroughly reviewed the parties' submissions and Magistrate Judge Baxter's comprehensive Report–Recommendation and finds that Magistrate Judge Baxter correctly recommended that the Court grant Defendants' motion for summary judgment and dismiss this case.

III. CONCLUSION

*4 After carefully reviewing Magistrate Judge Baxter's Report–Recommendation, the parties' submissions and the applicable law, and for the reasons stated herein, the Court hereby

ORDERS that Magistrate Judge Baxter's Report–Recommendation (Dkt. No. 210) is

ADOPTED in its entirety for the reasons stated therein; and the Court further

ORDERS that Defendants' motion for summary judgment (Dkt. No. 202) is **GRANTED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in Defendants' favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum–Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

REPORT–RECOMMENDATION

ANDREW T. BAXTER, United States Magistrate Judge.

This matter has been referred to me for Report and Recommendation pursuant to 28 U.S.C. § 636(b) and LOCAL RULES N.D.N.Y. 72.3(c). In this civil rights complaint, plaintiff alleges that defendants subjected him to religious discrimination, denial of access to courts, and retaliation for the exercise of his First Amendment Rights, while he was incarcerated at Mid–State Correctional Facility. (Compl.; Dkt. 1). Plaintiff seeks monetary and injunctive relief.

I. Procedural History

This case has had a long and complicated procedural history, complete with an appeal of the denial of a preliminary injunction to

the Second Circuit, which dismissed plaintiff's appeal as lacking an arguable basis in law or fact.¹ (Dkt. No. 133). The court will attempt to briefly state the important aspects of the docket and outline the remaining issues. On October 31, 2012, defendants made a motion for judgment on the pleadings. (Dkt. No. 123). Plaintiff responded in opposition to that motion, but then also made a variety of other motions relating to venue, recusal, and discovery. (Dkt. Nos.119, 139, 140, 144, 145, 149).

On April 3, 2013, I issued an Order and Report–Recommendation, denying some of plaintiff's non-dispositive motions and recommending dismissal of some of his substantive claims on the pleadings. (Dkt. No. 148). On May 15, 2013, Judge D'Agostino affirmed my order and approved my recommendation. (Dkt. No. 155). Judge D'Agostino's order also disposed of plaintiff's Motion Requesting the Court to Take Judicial Notice of Plaintiff's State Court Decision (Dkt. No. 149), his "Motion for Reconsideration," (Dkt. No. 122), and ordered a response to plaintiff's discovery motion (Dkt. No. 119). (Dkt. No. 155).

After Judge D'Agostino's Order, plaintiff filed additional motions: another Motion to Compel (Dkt. No. 159) and a Motion for Sanctions (Dkt. No. 160). On July 2, 2013, I held a telephonic conference with the parties regarding the outstanding motions, denying in part and granting in part, plaintiff's motions to compel (Dkt.Nos.119, 159); denying his motion for sanctions (Dkt.Nos.160); and finding that no action was necessary on other letters submitted by plaintiff. (Dkt.Nos.161–62). On September 13, 2013, plaintiff made a motion

to "stop transfer" and requested that his deposition be held at his current facility, Wyoming Correctional Facility. (Dkt.Nos.173, 175). Plaintiff's transfer to Greene Correctional Facility rendered that motion moot, and it was denied on that basis. (Dkt. No. 178).

*5 On October 10, 2013, plaintiff made a motion for injunctive relief and appointment of counsel, which plaintiff later clarified was only a motion for appointment of counsel. (Dkt.Nos.182, 187). This court denied the motion on October 31, 2013, and plaintiff then sent the court a letter stating that he did not wish to be appointed counsel at the time of trial. (Dkt.Nos.189, 190). On January 7, 2014, plaintiff stipulated to the dismissal of all claims against defendants Fischer and Marlenga, which was "so ordered" by Judge D'Agostino on January 8, 2014. (Dkt.Nos.196–97). Defendants filed this summary judgment motion on February 4, 2014. (Dkt. No. 202). Plaintiff responded in opposition to the motion, and requested oral argument. (Dkt. Nos.205, 207). I denied plaintiff's motion for oral argument on April 18, 2014. (Dkt. No. 208).

Presently pending before me is the remaining defendants' motion for summary judgment, together with plaintiff's response in opposition. (Dkt.Nos.202, 205). Based upon Judge D'Agostino's order approving my recommendation on May 15, 2013 (Dkt. No. 155) and the parties' stipulation to dismiss all claims against defendants Fischer and Marlenga, the following defendants and claims remain:

1. A First Amendment Free Exercise Clause claim against defendants Ready and Ellis. (Compl.¶¶ 37–47, 65).

2. A Religious Land Use and Institutionalized Persons Act (“RLUIPA”), claim against defendants Ready and Ellis. (*Id.*)
3. A retaliation claim against defendants Ready and Ellis relating to the above First Amendment and RLUIPA issues.
4. First Amendment retaliation claims against defendant Kupiec relating to the opening, loss, or destruction of plaintiff's mail in retaliation for grievances filed against Kupiec and defendant Ready. (Compl.¶¶ 58–64).
5. A First Amendment denial of access to courts claim against defendant Kupiec. (Compl.¶¶ 67).

II. Facts

Rather than engage in a lengthy discussion of the facts at the outset, the court will discuss the facts associated with each of plaintiff's claim within the relevant sections below.

III. Summary Judgment

Summary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Salahuddin v. Goord*, 467 F.3d 263, 272–73 (2d Cir.2006). “Only disputes over [“material”] facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). It must be apparent that no rational finder of fact could find in

favor of the non-moving party for a court to grant a motion for summary judgment. *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir.1994).

The moving party has the burden to show the absence of disputed material facts by informing the court of portions of pleadings, depositions, and affidavits which support the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies its burden, the nonmoving party must move forward with specific facts showing that there is a genuine issue for trial. *Salahuddin v. Goord*, 467 F.3d at 273. In that context, the nonmoving party must do more than “simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). However, in determining whether there is a genuine issue of material fact, a court must resolve all ambiguities, and draw all inferences, against the movant. See *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Salahuddin v. Goord*, 467 F.3d at 272.

IV. Religion Claims

A. Legal Standards

1. First Amendment

*⁶ Inmates have the right under the First and Fourteenth Amendments to freely exercise a chosen religion. *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir.2003) (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). However this right is not limitless, and may be subject to restrictions relating to legitimate penological concerns. *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir.1990). The analysis of a free

exercise claim is governed by the framework set forth in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) and *Turner v. Safely*, 482 U.S. 78, 84 (1987). This framework is one of reasonableness and is less restrictive than the standard ordinarily applied to the alleged infringements of fundamental constitutional rights. *Ford*, 352 F.3d at 588.

In *O'Lone*, the Supreme Court held that a regulation that burdens a protected right withstands a constitutional challenge if that regulation is reasonably related to legitimate penological interests. 482 U.S. at 349 (quoting *Turner*, 482 U.S. at 89). An individualized decision to deny an inmate the ability to engage in a religious exercise is analyzed under the same standard. *Salahuddin v. Goord*, 467 F.3d 263, 274 n. 4 (2d Cir. 2006) (citations omitted). In *Farid v. Smith*, 850 F.2d 917, 926 (2d Cir. 1988), the Second Circuit held that to assess a free exercise claim, the court must determine “(1) whether the practice asserted is religious in the person's scheme of beliefs and whether the belief is sincerely held; (2) whether the challenged practice of prison officials infringes upon the religious belief; and (3) whether the challenged practice of the prison officials furthers some legitimate penological interest.”

The court must examine whether the challenged action has a legitimate, rational connection to the governmental objective; whether prisoners have alternative means of exercising the burdened right; the impact on guards, inmates, and prison resources of accommodating that right; and the existence of alternative means of facilitating the exercise of that right that have only a *de minimis* adverse effect on the valid penological interests.

See King v. Bennett, No. 02-CV-349, 2007 WL 1017102, at *4 (W.D.N.Y. March 30, 2007) (citing *Salahuddin*, 467 F.3d at 274). Finally, once prison officials state a legitimate penological interest to justify their actions, the burden shifts to plaintiffs to show that the defendants' concerns are “irrational.” *Ford*, 352 F.3d at 595.

2. Religious Land Use and Institutionalized Persons Act

RLUIPA provides that

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

*7 42 U.S.C. § 2000cc-1(a). Under RLUIPA, the plaintiff bears the burden of showing that his religious exercise has been burdened and that the burden is substantial. *Marria v. Broaddus*, 200 F.Supp.2d 280, 297 (S.D.N.Y. 2002) (citing 42 U.S.C. § 2000cc-2(b)). The burden then shifts to the government to show that the burden furthers a compelling governmental interest *and* that it is the *least restrictive* means of achieving that interest. *Id.* The act defines “religious exercise” to include “any exercise of religion, whether or

not compelled by, or central to, a system of religious belief.” [42 U.S.C. § 2000cc–5\(7\)\(A\)](#).

A “substantial burden” is one that places “substantial pressure on an adherent to modify his behavior and to violate his beliefs.” [Singh v. Goord](#), 520 F.Supp.2d 487, 498 (S.D.N.Y.2007) (citing, *inter alia*, [Jolly v. Coughlin](#), 76 F.3d 468, 477 (2d Cir.1996)). Inconvenience alone is insufficient to establish a substantial burden. *Id.* (citing [Westchester Day School v. Village of Mamaroneck](#), 379 F.Supp.2d 550, 557 (S.D.N.Y.2005)). Furthermore, the substantial evidence test presupposes that some inconveniences may be so minor that they do not amount to a violation. See [McEachin v. McGuinnis](#), 357 F.3d 197, 203 n. 6 (2d Cir.2004) (discussing in a footnote the applicability of the “time-honored maxim ‘*de minimis non curat lex*’ ”). However, the court should not attempt to engage in resolving disputes as to whether a particular practice is “central” or “mandatory” to a particular religion in determining whether a burden was substantial. See [Ford v. McGinnis](#), 352 F.3d 582, 593–94 (2d Cir.2003) (discussing First Amendment protections).

B. Application

1. December 7, 2010 Incident:

Plaintiff alleges that defendant Ready denied plaintiff the right to attend Jewish Services for Lubavitch on December 7, 2010, even though he was on the call-out list for the service, and while making disparaging remarks about plaintiff's religion. (Compl.¶¶ 37–47). This court originally recommended denying defendant's motion for judgment on the pleadings, notwithstanding defendants'

argument that one interference with plaintiff's religious services would not rise to the level of a constitutional violation. I found, instead, that plaintiff claimed that Ready intentionally denied plaintiff the opportunity to attend this religious service, and that this action was also in retaliation for plaintiff filing a successful grievance against defendants Johnston and Ellis. (Dkt. No. 148 at 13). Based only on the facts as stated by plaintiff, and with a very liberal review by the court, this court recommended denying the motion for judgment on the pleadings.² (*Id.* at 14) (this court also noted that it was “unclear” how plaintiff's claims would fare after a well-supported summary judgment motion).

Defendant Ready has submitted a declaration in support of summary judgment. He states that he has been a corrections officer (“CO”) at Mid-State since September of 2010. (Ready Decl. ¶ 2) (Dkt. No. 202–3). On December 7, 2010, he was working on Unit 7–2. (*Id.* ¶ 5). His duties included running the desk at the entrance door of Building 7—the Program Building, ensuring that inmates were where they were scheduled to be, and permitting movement as necessary pursuant to “call-out sheets.” (*Id.*) When an inmate is listed on a call-out sheet, defendant Ready requires the inmate to sign out from his program, and then he is allowed to go to the “call-out.” (*Id.* ¶ 6).

*8 Defendant Ready states that on December 7, 2010, plaintiff came to him and stated that he had to leave his program for a “call-out.” However, plaintiff's name was not listed on the call-out sheets that defendant Ready was given for that day. (*Id.* ¶ 8). If an inmate's name is not on the sheet, he is not permitted to go to

the “call-out,” so defendant Ready informed plaintiff that he had to return to his program because his name was not on the sheet. (*Id.* ¶ 1). Defendant Ready states that he never made any comment about plaintiff’s religion. (*Id.* at 11). Plaintiff did not seem upset or angry, did not ask to see a sergeant or supervisor, and “merely complied with [defendant Ready’s] instructions and returned to class.” (*Id.* ¶ 12).

Defendant Ready states that the only reason that he prevented plaintiff from going to the call-out (religious service) was because his name was not on any of the call-out sheets that he had been given, and defendant Ready was not authorized to allow plaintiff to attend the call-out. (*Id.* ¶¶ 10, 14). Finally, defendant Ready points out that he had just transferred to Mid-State in September of 2010, thus, he was not aware of plaintiff’s September 2010 grievance when Ready did not allow plaintiff to attend the religious service on December 7, 2010. (*Id.* ¶ 13).

As Exhibit I to plaintiff’s complaint, he attaches a copy of the “call-out” for Tuesday, December 7, 2010. Plaintiff’s name clearly appears on that call-out. (Compl.Ex. I). Father Robert Weber³ has filed a declaration in support of defendants’ motion for summary judgment, stating that in December 2010, he was the Coordinating Chaplain at Mid-State. (Weber Decl. ¶ 3) (Dkt. No. 202–7). Father Weber states that when he arrived at work on December 7, 2010, he realized that there was no call-out for the Lubavitch Youth Organization, members of which were visiting the Jewish inmates for Chanukah. (*Id.* ¶ 6). In an attempt to rectify this error, Father Weber “caused a callout to be generated with the names of those inmates

who regularly attend Jewish Services .” (*Id.* at 7). Although Father Weber states that a copy of the call-out is attached to his declaration as Exhibit A, no such copy is attached. The court will assume that the call-out to which Father Weber refers is the one that is attached to plaintiff’s complaint as Exhibit I. (Dkt. No. 1 at 46). Plaintiff’s name is on that call-out.

Father Weber then states that, after Deputy Superintendent for Programs (“DSP”) Phillips approved the call-out, it was “hand-delivered to the Housing Units within the correctional facility.” (Weber Decl. ¶ 8). “Inadvertently, the callout was not added to the daily callout packet nor was it delivered to the program areas that day.” (*Id.* ¶ 9). Although plaintiff’s name certainly appears on the call-out, unfortunately defendant Ready, who was at the Program Building that day, did not have that call-out in front of him when plaintiff approached to ask about going to services, and defendant Ready was justified in refusing to let plaintiff attend the services. The Superintendent’s investigation of plaintiff’s grievance resulted in the same finding:

*9 The facility investigation revealed that the Jewish Services call-out was not submitted with the other scheduled inmate call-outs on the day before (12/6/10), which is normal procedure; therefore, it was not included with 12/7/10 facility call-out packet. The inmate call-out packets are normally distributed to all program

areas, housing units as well as other staff/inmate areas the day before the call-outs are scheduled. On the morning of the posted call-out (12/7/10), this error was brought to the attention of the Coordinating Chaplain, who then had the Jewish Services call-out hand delivered to the housing units but not to the program areas. Although the 7–2 officer [Ready] and the grievant's general business instructor [Gruen] reviewed the p.m. call-outs to verify/confirm the grievant's statements, neither staff member would have been aware the grievant was listed on the 12/7/10 Jewish Services call-out scheduled for 2:00 p.m. nor would they have been aware that there was an addition to the original call-out packet because it was never delivered to their program area.

(Compl.Ex. L) (Dkt. No. 1 at 50).⁴ This document, attached as an exhibit to plaintiff's complaint, corroborates defendant Ready's and Father Weber's version of the events. Defendant Ready did not intentionally deny plaintiff the opportunity to attend the service on December 7, 2010 because although plaintiff's name was on the call-out list, defendant Ready did not have that list in front of him,⁵ and he would

not even have been aware that the list existed because it was not delivered to the program area. This one, clearly inadvertent incident, does not rise to the level of a constitutional violation committed by defendant Ready.⁶

In his response to defendants' motion for summary judgment, plaintiff states that the defendants are lying, and that the call-out was delivered to "all" program areas. (Pl.'s Mem. ¶ 10) (Dkt. No. 205–1 at 9). Plaintiff states that he reaches this sweeping *conclusion* because "[t]he location where the Jewish Services [are] held (Building # 101) is *a Program Area*," and security staff in that area must have had the call-out because they would not have let the thirteen other Jewish inmates in the building. (*Id.*) (emphasis added). If one program area had the call-out, then all the program "areas" must have had the call-out. However, plaintiff's argument misses the point. Defendant Ready was not in Building # 101. He was in Unit 7–2 in Building 7,⁷ and the fact that the building in which the religious services were actually held had the call-out,⁸ does not "prove" or even raise a question of fact regarding whether the call-out had been sent to the other program areas, in the face of Father Weber's sworn statement that he did not send the call-out to the program areas. Although plaintiff states that Building # 101 is "a" program area, it is not "the" Program Building.⁹

In my prior report, I recommended denying defendants' motion to dismiss on the pleadings, notwithstanding case law holding that missing one religious service does not constitute a substantial burden on the inmate's right to the free exercise of his religion under either

under the First Amendment or under RLUIPA. (Dkt. No. 148 at 13) (citing *inter alia* *Troy v. Kuhlmann*, No. 96 Civ. 7190, 1999 WL 825622, at * 15 (S.D.N.Y. Oct. 15, 1999)). In granting **summary judgment**, the court in *Troy* stated that “courts in the Second Circuit have held that an inmate’s right to practice his religion is not substantially burdened if an inmate missed one religious service for **a valid reason.**” *Id.* (emphasis added). I did not rely on *Troy* in my prior report, because the defendants in this case brought a motion for judgment on the pleadings, and this court was bound by the facts as stated in plaintiff’s complaint. Now that defendants have moved for summary judgment, the court may consider material outside the complaint, such as sworn declarations, in determining that, while plaintiff missed one religious service through the actions of defendant Ready, this inadvertent denial did not substantially burden the plaintiff’s free exercise of his religion. In denying plaintiff the opportunity to attend his call-out, defendant Ready acted according to the documentation before him. Even if a mistake were made, it was the lack of proper documentation that caused plaintiff to miss his service.¹⁰ Neither the First Amendment, nor RLUIPA was violated by defendant Ready.

2. The March 20, 2011 Incident

***10** The second incident occurred on March 20, 2011, when plaintiff claims that defendant Ellis intentionally cut short a visit from Lubavitch Rabbis who had come from Brooklyn to see plaintiff¹¹ at the facility. (Compl.¶ 65). Plaintiff claims that he was scheduled to meet with the Rabbis for one and one half hours in order to celebrate the Purim

holiday. (*Id.*) Plaintiff claims that defendant Ellis cut the service to a matter of minutes and sent all of the Jewish inmates back to their housing units.

Defendant Ellis has submitted a declaration in support of defendants’ motion for summary judgment. (Ellis Decl.) (Dkt. No. 202–5). Kurt Ellis is employed by DOCCS as a Protestant Reverend, and at the time of the declaration, held the position of Chaplain at Mid-State. (Ellis Decl. ¶¶ 1–2). Defendant Ellis states that on March 20, 2011, Rabbi Theodore Max scheduled a Purim celebration in the small chapel at MidState with some members of the Lubavitch organization. (*Id.* ¶ 5). The call-out was approved for 2:30 p.m. on March 20, 2011. Defendant Ellis spoke with Corrections Officer (“CO”) Backer, the Building 101 main console officer and explained that the call-out was for 2:30, but that the Rabbi might be late because he was making Purim rounds at other facilities, and a delay was possible. (*Id.* ¶¶ 6–7).

Defendant Ellis states that at approximately 1:45 p.m., he noticed that plaintiff was working in the Law Library, which is adjacent to the Building 101 console. (*Id.* ¶ 8). Defendant Ellis mentioned to CO Backer that plaintiff was on the Purim call-out, but Ellis was not sure if plaintiff would need to go back to his housing unit at the 2:15 “go back” and then return for the Purim call-out. (*Id.*) CO Backer told defendant Ellis that plaintiff would have to go back to his housing unit and then return when it was time for the Purim call-out. (*Id.*)

Defendant Ellis told plaintiff that he knew that plaintiff had “an issue” before, and Ellis wanted to make sure that plaintiff did not have any

trouble that day. (*Id.* ¶ 9). Ellis told plaintiff that, because he was currently signed out for the Law Library, he would have to go back to his housing unit at 2:15 p.m. and then return “when they call for the service.” Plaintiff responded that he did not have to go back and asked the Law Library officer whether plaintiff could go directly to the service from the Law Library at 2:30. CO Ippolito, the Law Library Officer gave plaintiff permission to do so. Defendant Ellis states that he left, but informed CO Backer what CO Ippolito told plaintiff, and CO Backer agreed that CO Ippolito “should not have said that.” (*Id.*.)

Reverend Ellis states that he has no authority over the procedure for “inmate movement” at the facility because movement is a matter of security. (*Id.* ¶ 10). At approximately 2:30 p.m., defendant Ellis went to the small chapel to see if the Rabbi had arrived, but the Rabbi was not there yet. Defendant Ellis went to check with CO Backer. Plaintiff also approached the “security bubble” to check with CO Backer. Plaintiff was told by CO Backer and by defendant Ellis that the Rabbi had not arrived, and plaintiff went back to the Law Library. (*Id.* ¶ 11).

***11** Defendant Ellis then went to see if Rabbi Max had arrived, but was told that the Rabbi had not been seen. Defendant Ellis did his “weekly rounds in the Visitor’s Center, signing into the Log Book at 2:45 p.m.” (*Id.* ¶ 12). After a brief conversation with a staff member, defendant Ellis saw the Lubavitch volunteers pulling into the parking lot. Defendant Ellis greeted Rabbi Max and continued on his daily rounds, stopping at the Watch Commander’s

Office to inform him that Rabbi Max had arrived. (*Id.*)

Defendant Ellis states that he was not involved in calling inmates for the Purim Service, nor did he attend the Service on March 20, 2011.¹² Defendant Ellis continued with his daily rounds and did not return to his office until approximately 3:45 p.m., at which time he noticed the inmates in the small chapel with the Rabbis. (*Id.* ¶ 16). Defendant Ellis states that after the service ended, he spoke to Rabbi Max, who stated that the service went well. (*Id.* ¶ 17). Defendant Ellis states that he was not in charge of the Service, he had no involvement in the time that the Service began or ended, and he did not order the inmates back to their housing units at the conclusion of the Service. (*Id.* ¶¶ 18–20).

Defendants have also submitted the declaration of Rabbi Theodore Max,¹³ who states that he is a Chaplain who is responsible for leading the primary congregational worship and prayer services for Jewish inmates. (Max Decl. ¶¶ 1–3). He is assigned to multiple correctional facilities, including Mid-State. (*Id.* ¶ 4). Rabbi Max states that he coordinated the Purim celebration, and he was advised to schedule the call-out for 2:30, even though he was not scheduled to arrive until 2:45 that day. The Service was scheduled to last approximately one hour. (*Id.* ¶¶ 6–7). Rabbi Max states that he was on a “very tight” schedule on March 20, 2011 because he was scheduled to visit “at least three correctional facilities” before his visit to Mid-State. (*Id.*) When he and the members of the Lubavitch organization arrived at Mid-State, there was a long line of visitors, which delayed their entrance into the facility, causing the Purim celebration to begin later than 2:45

p.m. (*Id.* ¶¶ 10–11). Rabbi Max states that pursuant to facility rules, the inmates were still required to return to their cells at 3:45 p.m., and that the Purim celebration ended at that time. (*Id.* ¶ 12).

Plaintiff does not claim that he missed the celebration, only that the celebration was shorter than originally scheduled. Rabbi Max has explained that he arrived late, causing the service to begin later, and run shorter than anticipated. Defendant Ellis had nothing to do with scheduling the event, with Rabbi Max being late, or with shortening the service.

Plaintiff argues that defendant Ellis sent plaintiff back to the law library and the other Jewish inmates back to their housing units, for the purpose of shortening the service. In his response to the motion for summary judgment plaintiff states that during *his* deposition, the defendants “admitted” that defendant Ellis sent the Jewish inmates back to their cells to shorten the service. (Pl.’s Mem. ¶ 19) (citing Deposition Transcript (“DT”) at 49). The deposition transcript is not an “admission” by defendants, and does not state that defendant Ellis sent the inmates back to their cells.

*12 During his deposition, plaintiff testified that Reverend Ellis allows *Protestant* inmates to come to the chapel before Ellis is ready to conduct the service, but does not allow Jewish inmates to go to their place of worship and wait if the Rabbi is not there. (DT at 49). “Whenever we go to the Jewish services, he sends us all back. ‘Go back to your housing unit.’” (*Id.*) Defense counsel then asked plaintiff a question: “even though the rabbis came a little bit late, and even though they sent some of the inmates

back to their cells, you were able to meet with the rabbis that day and have a short prayer service.” (*Id.*) This *question by counsel* is **not** an *admission by a defendant*, and counsel was making the point that “even if” what plaintiff said were true—that someone sent the Jewish inmates back to their cells because Rabbi Max had not arrived—plaintiff still attended the service, notwithstanding that it was shorter than anticipated.

Rabbi Max’s declaration shows that *he* was late beginning the service, and the inmates were required to return to their cells at 3:45. Defendant Ellis had nothing to do with the length of the service.¹⁴ Under the appropriate definition, plaintiff’s religious rights were not substantially burdened. In order for the defendant’s interference to be a “substantial burden” on the inmate’s religious exercise, the interference must be more than an inconvenience, and plaintiff must demonstrate that the government’s action pressured plaintiff to commit an act forbidden by his religion or prevented him from engaging in conduct or having a religious experience mandated by his faith. *Pugh v. Goord*, 571 F.Supp.2d 477, 504–05 (S.D.N.Y.2008); *Graham v. Mahmood*, No. 05–10071, 2008 WL 1849167, at * 14 (S.D.N.Y. Apr. 22, 2008); *Gill v. DeFrank*, No. 98 Civ. 7851, 2000 WL 897152, at *1 (S.D.N.Y. July 6, 2000) (citing *Boomer v. Irvin*, 963 F.Supp.2d 227, 230 (W.D.N.Y.1997)).

In addition, although plaintiff may disagree, the shortening of his Purim celebration because the Rabbi was late or because plaintiff had to wait for other inmates to come back from their housing units did not amount to a “substantial burden.” This delay may certainly have been

“an inconvenience.” However, plaintiff admits that the Service did occur, that prayers were said, and that the inmates were allowed to eat the food, albeit too quickly for plaintiff’s liking. Thus, neither the Constitution, nor RLUIPA were violated by defendant Ellis. Plaintiff’s retaliation claim will be discussed below.

V. Mail/Access to Courts/Retaliation

A. Legal Standards

1. Mail

Among the protections enjoyed by prison inmates, subject to appropriate limitations, is the right “to the free flow of incoming and outgoing mail” guaranteed by the First Amendment. *LeBron v. Swaitek*, No. 05-CV-172 (GLS/DRH), 2007 WL 3254373, at *6 (N.D.N.Y. Nov. 2, 2007) (Sharpe, J.) (quoting *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir.2003)). “The boundary between an inmate’s First Amendment right to free speech and the ability of prison officials to open or otherwise interfere with an inmate’s mail is not precise.” *Cancel v. Goord*, No. 00 CIV 2042, 2001 WL 303713, at *5 (S.D.N.Y. March 29, 2001). This right, however, must yield to the legitimate penological interests of prison officials when mail is monitored for the purpose of ensuring order in the prison by preventing illegal activities. *Duamutef v. Hollins*, 297 F.3d 108, 112–13 (2d Cir.2002) (citing, *inter alia*, *U.S. v. Workman*, 80 F.3d 688, 699 (2d Cir.1996)). “The [Supreme] Court has counseled judicial restraint in the federal courts’ review of prison policy and administration, noting that ‘courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.’” *Giano v. Senkowski*, 54 F.3d 1050,

1053 (2d Cir.1995) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)).

*13 Actions taken by prison administrators directed toward inmate mail are subject to the overarching consideration that a prison regulation infringing on an inmate’s constitutional rights is valid so long as the regulation is “reasonably related to the legitimate penological interests.” *Turner v. Safley*, 482 U.S. at 89. Applying this precept, “[c]ourts have constitutionally afforded greater protection … to outgoing mail than to incoming mail.” *Davis*, 320 F.3d at 351 (citations omitted). Nonetheless, the Second Circuit has held that “‘where good cause is shown, outgoing mail can be read’ without violating inmates’ First Amendment rights.” *Workman*, 80 F.3d at 698 (quoting *Wolfish v. Levi*, 573 F.2d 118, 130 n. 27 (2d Cir.1978), *rev’d in part on other grounds sub nom.*, *Bell v. Wolfish*, 441 U.S. 520 (1979)).

Prison security is a legitimate penological interest that justifies limitations on an inmate’s First Amendment rights related to regular mail. See *Cancel v. Goord*, 2001 WL 303713, at *6. “[T]he interception of a prisoner’s correspondence does not violate that individual’s First Amendment rights ‘if prison officials had good or reasonable cause to inspect the mail.’” *Knight v. Keane*, No. 99 Civ. 3955, 2005 U.S. Dist. LEXIS 18702, at *18 (S.D.N.Y. August 26, 2005) (citing *United States v. Felipe*, 148 F.3d 101, 108 (2d Cir.1998)) (Rep’t–Rec.), adopted 2006 WL 89929 (S.D.N.Y. Jan. 12, 2006). To establish a claim for interference with regular, non-legal mail, the plaintiff must show “‘a pattern and practice of interference that is

not justified by any legitimate penological concern.” *Singleton v. Williams*, No. 12 Civ.2021, 2014 WL 2095024, at *3 (S.D.N.Y. May 20, 2014) (quoting *Cancel, supra.*) An isolated incident is generally insufficient to establish a constitutional violation. *Id.* (citing *Davis*, 320 F.3d at 351).

Legal mail is entitled to a higher degree of protection than regular mail, and “prison policies or practices which interfere with legal mail on a regular basis whether incoming or outgoing must be supported by a legitimate penological interest other than mere general security concerns which permit interference with regular mail. *Cancel v. Goord*, 2001 WL 303713, at *6–7 (citing *Washington v. James*, 782 F.2d 1134, 1139 (2d Cir.1986)). Plaintiff must still show that prison officials “ ‘regularly and unjustifiably interfered with the ... legal mail.’” *Singleton*, 2014 WL 2095024, at *4 (quoting *Cancel, supra.*) As few as two incidents of mail tampering may constitute an actionable violation if the incidents suggest and ongoing practice of censorship that is unjustified by a substantial governmental interest or if the tampering unjustifiably chilled the inmate’s right to access to courts as discussed below or impaired legal representation that plaintiff received. *Vega v. Rell*, No. 3:09-CV-737, 2013 WL 6273283, at *10 (D.Conn. Dec. 4, 2013) (citing *Washington*, 782 F.2d at 1139).

2. Access to Courts

*14 Legal mail claims are sometimes related to claims that defendants have denied an inmate access to courts by interfering with legal mail. It is well-settled that inmates have a constitutional right to “meaningful” access

to the courts. *Bounds v. Smith*, 430 U.S. 817, 823 (1977). The Supreme Court held in *Bounds* that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” 430 U.S. at 828.

“Mere ‘delay in being able to work on one’s legal action or communicate with the courts does not rise to the level of a constitutional violation.’” *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir.2003) (citing *Jermosen v. Coughlin*, 877 F.Supp. 864, 871 (S.D.N.Y.1995)). In addition, “to establish a constitutional violation based on a denial of access to the courts, a plaintiff must show that the defendant’s conduct was deliberate and malicious, and that the defendant’s actions resulted in actual injury to the plaintiff.” *Lewis v. Casey*, 518 U.S. 343, 351 (1996). See *Collins v. Goord*, 581 F.Supp.2d 563, 573 (S.D.N.Y.2008). In order to show actual injury, the defendants’ conduct must have “hindered [plaintiff’s] efforts to pursue a legal claim.” 518 U.S. at 351.

3. Retaliation

In order to establish a claim of retaliation for the exercise of a First Amendment right, plaintiff must show that he engaged in constitutionally protected speech or conduct, and that the protected activity was a substantial motivating factor for “adverse action” taken against him by defendants. *Bennett v. Goord*, 343 F.3d 133, 137 (2d Cir.2003) (citing *Gayle v. Gonyea*, 313 F.3d 677 (2d Cir.2002); see also *Hendricks v. Coughlin*, 114 F.3d 390 (2d Cir.1997)). The Second Circuit has defined “adverse action”

in the prison context as “retaliatory conduct ‘that would deter a similarly situated individual of ordinary firmness from exercising ... constitutional rights.’” *Gill v. Pidlypchak*, 389 F.3d at 381 (citation omitted). This objective test applies whether or not the plaintiff was himself subjectively deterred from exercising his rights. *Id.*

To establish retaliation, the plaintiff must also establish a causal connection between the protected speech or conduct and the adverse action. *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir.2004). Although a “plaintiff can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action[,]” “[s]uch circumstantial evidence of retaliation, ... without more, is insufficient to survive summary judgment.” *Roseboro v. Gillespie*, 791 F.Supp.2d 353, 370 (S.D.N.Y.2011) (citations omitted).

Even if plaintiff makes the appropriate showing of retaliation, defendants may avoid liability if they demonstrate that they would have taken the adverse action even in the absence of the protected conduct. *Id.* at 371. “Regardless of the presence of retaliatory motive, ... a defendant may be entitled to summary judgment if he can show ... that even without the improper motivation the alleged retaliatory action would have occurred.” *Scott v. Coughlin*, 344 F.3d 282, 287–88 (2d Cir.2003) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

*15 The court must keep in mind that claims of retaliation are “easily fabricated” and “pose a substantial risk of unwarranted

judicial intrusion into matters of general prison administration.” Accordingly, plaintiff must set forth non-conclusory allegations to sustain a retaliation claim. *Bennett*, 343 F.3d at 137. Even where a complaint or affidavit contains specific assertions, the allegations “may still be deemed conclusory if [they are] (1) ‘largely unsubstantiated by any other direct evidence’ and (2) ‘so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint.’” *Smith v. Woods*, 9:03-CV-480 (DNH/GHL), 2006 WL 1133247, at *3 & n. 11 (N.D.N.Y. Apr. 24, 2006) (quoting *Jeffreys v. City of New York*, 426 F.3d 549, 554–55 (2d Cir.2005)). To be sufficient to create a “factual issue,” in the context of a summary judgment motion, an allegation in an affidavit or verified complaint “must, among other things, be based ‘on personal knowledge.’” *Id.*, 2006 WL 1133247, at *3 & n. 7 (collecting cases); Fed.R.Civ.P. 56(c)(4).

B. Application

1. Defendant Kupiec

a. Relevant Facts—Interference/Retaliation
In his complaint, plaintiff alleged that after he filed a grievance against defendant Ready, which was denied on January 14, 2011, defendant Kupiec¹⁵ began to lose and/or destroy plaintiff’s packages that were received in the mail room.¹⁶ (Compl.¶¶ 57–64). Plaintiff claims that on January 14, 2011, the same day that the Superintendent rendered a decision on plaintiff’s grievance against defendant Ready, plaintiff received a package from Stratford Career Center, to

study for his paralegal degree. (Compl.¶ 58). Plaintiff states “Defendant Theda Kupiec ‘got word’ of the complaint contra the aforesaid officers and started to intentionally lose and destroy the plaintiff’s legal packages from said school.” (*Id.*) Plaintiff states that the “package” with his text and exams was never recovered, but he did “receive the Paralegal Course from the school on the said date in question.”¹⁷ (*Id.* & Ex. M).

Plaintiff states that he “was never once called down to the package room or mail room in the entire month of [J]anuary, 2011.” (Compl.¶ 58). He then states that “this only indicates that anytime an inmate (in this case the plaintiff) files a grievance against the defendant’s [sic]—retaliation takes place.” (*Id.*) Plaintiff speculates that retaliation can take the form of missing packages or “planting weapons on the inmate … to make sure that the inmates [sic] goes to the box (Special Housing Units) where he is limited to legal materials.”¹⁸ (*Id.*)

The complaint also alleges that after he appealed the Superintendent’s decision regarding the December 7, 2010 incident against Ready, a “Notice of Intention to File a Claim” (“Notice”) was improperly sent “regular” mail, rather than by Certified Mail as is required under New York State Law and notwithstanding that plaintiff paid for certified mail. (Compl.¶¶ 60–63). Plaintiff alleges that on March 15, 2011, his parents sent him a food package that he never received, purportedly due to the retaliation by defendant Kupiec. (Compl.¶ 63). Several paragraphs later, plaintiff states that, on May 17, 2011, defendant Kupiec “slashed open” plaintiff’s legal mail, removed the documents

outside of his presence, and sent the documents to plaintiff in a coffeestained, “stampless” envelope. (Compl.¶ 82). In plaintiff’s response to defendants’ motion for summary judgment, he also mentions an incident that is not part of the complaint. Plaintiff alleges that defendant Kupiec opened his mail and ripped up his “law school exam scores.” (Dkt. No. 205–1, ¶ 33). This court will not consider this final allegation against defendant Kupiec.¹⁹

*16 Defendants have filed the declaration of defendant Theda Kupiec, Senior Mail Clerk at Mid-State. (Kupiec Decl. ¶¶ 1–2) (Dkt. No. 202–4). Defendant Kupiec states that her responsibilities include sorting outgoing mail and placing the appropriate postage after verification that the inmate has sufficient funds, in addition to sorting incoming mail for distribution to the housing units. (*Id.* ¶ 6). Defendant Kupiec states that she has no responsibility “whatsoever” with respect to “packages” that are received for inmates. She states that the mail room in which she works is located in Building 20 of the Administration Building, which is located outside of the secure fence around the facility. However, the “package room” is located in Building 101, which is located inside the secure fence. (*Id.* ¶¶ 7–8).

Defendant Kupiec states that she was not aware of any grievance plaintiff may have filed against defendant Ready, and that she does “not personally know Correction Officer Ready.” (*Id.* ¶¶ 11–12). Defendant Kupiec states that “at some point,” she became aware of plaintiff’s claim that he did not receive the Stratford Career Institute package, but because defendant Kupiec does not work in the package

room, and has no responsibility for packages, she has no knowledge of the result of plaintiff's complaint. (*Id.* ¶ 14).

Defendant Kupiec states that she did inadvertently mail plaintiff's Notice via regular mail. (*Id.* ¶ 15). Plaintiff requested that the envelope be sent Certified, and defendant Kupiec first sent the mail to the Business Office to verify that plaintiff had adequate funds for certified mail. When the mail was returned to her with the authorization, defendant Kupiec inadvertently sent the mail with regular postage. Defendant Kupiec states that she realized her mistake when plaintiff filed a grievance, to which she responded by admitting her error and reimbursing plaintiff for the difference in the postage. Defendant Kupiec states that the mistake was hers, and no one "told" her to send the mail out via regular mail rather than certified. (*Id.* ¶¶ 15–16 & Ex. A). Exhibit A to defendant Kupiec's declaration is a copy of the memorandum that she sent to plaintiff apologizing for the error and reimbursing him for the cost of the mailing.²⁰ Defendant Kupiec states that she is completely unaware of plaintiff's missing food package because she does not work in the package room. (*Id.* ¶ 17).

Defendant Kupiec also states that on May 18, 2011, she received a manila envelope from the package room with plaintiff's name and DIN number on it, with no indication that it was legal mail.²¹ She opened the envelope to record the contents, and when she realized that the mail was from a court, she wrote which court the mail came from on the front of the envelope and send the mail to the Legal Officer. (*Id.* ¶ 19 & Ex. B). Exhibit B is the

memorandum that defendant Kupiec wrote to the IGRC, explaining what happened with the manila envelope.²² (*Id.*) Defendant Kupiec states that she did not open plaintiff's legal mail intentionally or in retaliation for any grievance, but merely in the "normal course of [her] job duties" (*Id.* ¶ 20).

b. Discussion

*17 These incidents do not show constitutional interference with plaintiff's mail, nor do the facts show that defendant Kupiec was retaliating against plaintiff for his grievances. First, it is clear that defendant Kupiec does not work in the package room, and had no personal involvement in, and would not have been responsible for, either plaintiff's alleged text book "loss" or the alleged loss of his kosher food.²³ The court will focus on plaintiff's allegations that defendant Kupiec tampered with his mail on February 25, 2011 (certified mail claim) and on May 17, 2011 (opening of legal mail).

The fact that plaintiff's Notice was sent regular mail, rather than certified is not interference with plaintiff's mail. The mail was sent, it was just sent by a different method of delivery.²⁴ This mistake shows neither intent, nor a "pattern and practice" of interference. At worst, it shows an error by defendant Kupiec in sending out plaintiff's mail, for which plaintiff was reimbursed.²⁵ The incident in which defendant Kupiec sent plaintiff documents in a plain manilla envelope after she realized that the documents were sent by a court also shows an error by facility staff in the package room, that defendant Kupiec attempted to rectify by writing which court the documents came from

on the envelope and having it delivered to plaintiff through the proper channels for legal mail.²⁶ Defendant Kupiec states that the court documents were already in the plain manilla envelope when she received them.

Plaintiff claims that defendant Kupiec was retaliating against plaintiff for the grievances that he filed. Plaintiff first mentions the grievance he filed against defendant Ready after the December 7, 2010 incident, which was denied by the Superintendent on January 14, 2011.²⁷ Plaintiff's statement that defendant Kupiec was aware of plaintiff's grievance against defendant Ready because an inmate named "Rogers" told defendant Kupiec about the grievance, is completely conclusory. The first time plaintiff ever mentioned inmate Rogers was at plaintiff's deposition. (Pl.'s Dep. at 61). Plaintiff stated that Inmate Rogers worked in the grievance office and knew who was filing grievances against officers, so Inmate Rogers told defendant Kupiec about the decision on plaintiff's grievance against Ready "because [plaintiff] was already putting in paperwork on why my legal mail was being messed with." (Pl.'s Dep. at 62). This statement by plaintiff is not even plausible. See *Jeffreys v. City of New York*, 426 F.3d 549, 555 (2d Cir.2005) (no genuine issue of material fact when plaintiff's explanation is not even plausible); *Haust v. United States*, 953 F.Supp.2d 353, 361 (N.D.N.Y.2013) (court may discredit plaintiff's self-serving testimony when it is so replete with inconsistencies and improbabilities that no reasonable fact-finder would undertake the suspension of disbelief necessary to credit the allegations made in his complaint) (quoting *Jeffreys, supra*).

*18 Defendant Kupiec states that she does not know defendant Ready, and that plaintiff's allegation that an inmate named "Rogers" informed Kupiec of the grievance against Ready is untrue. (Kupiec Decl. ¶ 13). Although defendant Kupiec is aware that Inmate Rogers works in the grievance office, she could not identify Rogers, nor has she ever had any contact with him. (*Id.*) The grievance against defendant Ready had to do with religion, not mail. The fact that plaintiff may have begun "putting paperwork together" regarding a grievance about his legal mail against defendant Kupiec, which plaintiff did not file until March or April of 2011, would not support Inmate Rogers deciding to tell defendant Kupiec about a grievance filed against a different defendant, coincidentally on the same day that plaintiff claims a package was delivered for him.²⁸ As stated above, defendant Kupiec does not work in the package room and would not have been responsible for the alleged loss of any package delivered to the facility for plaintiff in January of 2011 or any other time.

In addition, it is difficult to establish one defendant's retaliation for complaints against another defendant. See, e.g., *Hare v. Hayden*, 09 Civ. 3135, 2011 WL 1453789, at *4 (S.D.N.Y. Apr. 14, 2011) ("As a general matter, it is difficult to establish one defendant's retaliation for complaints against another defendant.") (citing *Wright v. Goord*, 554 F.3d 255, 274 (2d Cir.2009) (dismissing retaliation claim against a corrections officer when only alleged basis for retaliation was complaint about a prior incident by another corrections officer); *Roseboro v. Gillespie*, 791 F.Supp.2d 353, 369 (S.D.N.Y.2011) (plaintiff failed to provide any

basis to believe that a corrections counselor would retaliate for a grievance that she was not personally named in) (collecting cases); *Ciaprazi v. Goord*, No. 9:02-CV-915 (GLS/DEP), 2005 WL 3531464, at *8–9 (N.D.N.Y. Dec. 22, 2005) (granting summary judgment and dismissing retaliation claim based only on plaintiff's conclusory allegations that the manifest falsity of the misbehavior report and testimony during the disciplinary hearing indicated the disciplinary matters were motivated by retaliatory animus due to grievances plaintiff filed against individuals other than the defendants involved in the disciplinary action). See also *Faulk v. Fisher*, 545 F. App'x 56, 58–59 (2d Cir. 2013) (temporal proximity to the protected action and excellent disciplinary history prior to the allegedly retaliatory misbehavior reports were insufficient to avoid summary judgment when there was no additional evidence, and neither of the officers were involved in the successful grievance); *Bennett v. Goord*, No. 06–3818–pr, 2008 WL 5083122, at *2 (2d Cir. Dec. 2, 2008) (citing *inter alia* *McPherson v. N.Y. City Dep't of Educ.*, 457 F.3d 211, 215 (2d Cir. 2006) (speculation alone is insufficient to defeat a motion for summary judgment)).

*19 Plaintiff also may be claiming that defendant Kupiec's subsequent actions were in retaliation for the grievance that plaintiff ultimately filed against defendant Kupiec in March or April of 2011. In her declaration, defendant Kupiec denies ever opening plaintiff's legal mail in retaliation for a grievance filed against her.²⁹ (Kupiec Decl. ¶ 18). In any event, plaintiff suffered no adverse action, as defined by the case law,³⁰ as the result of defendant Kupiec inadvertently

opening plaintiff's legal mail that was sent to her from the package room.³¹ This action would not deter a similarly situated inmate from exercising his constitutional rights. This action also would not deter a similarly situated inmate from asserting his rights.³² It does not show malice or retaliation by defendant Kupiec. Plaintiff's mail interference and retaliation claims may be dismissed.

b. Access to Courts

Plaintiff claims that defendant Kupiec's failure to send his Notice by certified mail denied plaintiff access to courts because he was forced to withdraw his action.³³ Plaintiff's allegation has no basis whatsoever. Plaintiff concedes that he withdrew his New York Court of Claims action of his own accord. At his deposition, plaintiff stated “I had to dismiss [the Court of Claims action] because after I found out about these reckless lies, I had to dismiss it.” (Pl.'s Dep. at 79). At plaintiff's deposition, the Assistant Attorney General asked why plaintiff did not just send a new Notice if he really believed that his case would be dismissed without a notice sent by certified mail. It was clear that plaintiff would have had time to send a new one, and plaintiff had been reimbursed for the mail that was improperly sent. (*Id.* at 80–82). Plaintiff then stated that the notice covered earlier incidents, and would have been untimely for the “earlier” incidents. (*Id.* at 82).

At the same time, plaintiff stated that he withdrew the action because he “wanted to change his theory” and go to federal court, because plaintiff stated that the “Court of Claims is only [for] negligence and property damage.” (*Id.* at 83). Plaintiff then reasserted

that the “Court” **would have** stricken his “motion”³⁴ because he did not serve the Attorney General with his Notice by certified mail. Plaintiff cannot “create” an access to courts claim by voluntarily withdrawing his action and then speculating what the court would have done if he had not withdrawn the action.

According to plaintiff, the Notice was required to be served on the Attorney General, not the Court. (T. 81). The court would have no way of knowing that the Notice was not served by certified mail, unless the Attorney General made a motion to dismiss on that basis. Even if the Attorney General made such a motion, plaintiff could have opposed the motion by stating that a mistake was made in mailing the item. There is no way to know that plaintiff’s case would have been dismissed. In any event, it is clear from plaintiff’s deposition that he would not have stayed in the Court of Claims. At his deposition, he clearly stated that he “wanted to change his theory” and go to Federal Court. (DT at 83). That is not a denial of access to courts “caused” by defendant Kupiec’s conduct. Thus, plaintiff’s access to courts claim may be dismissed.

2. Defendants Ready and Ellis

***20** Plaintiff alleges that the actions taken by defendants Ready and Ellis were taken in retaliation for a grievance that plaintiff filed on September 20, 2010 against defendant Ellis and CO Johnston.³⁵ Defendant Ready states that he did not know about the September 20, 2010 grievance on December 7, 2010, because he was transferred to Mid-State in September of 2010. (Ready Decl. ¶ 13). In his response,

plaintiff argues that defendant Ready must have known about the September grievance because “it was not until November 24, 2010 that the Grievance Supervisor disciplined the officers including Ready regarding allowing inmates ... to adhere to Jewish memos and callouts.” (Pl.’s Mem. at ¶ 24) (Dkt. No. 205–1 at 18).

First, the court notes that there is no indication the Ready, or any other officer was “disciplined.” The Superintendent’s response states that the facility policies were reviewed and “corrective action taken.”³⁶ This does not mean “discipline .” The Superintendent’s response also states that the “referenced employees were advised and clarification given with regards to this matter.” (Pl.’s Ex. N(1) (Dkt. No. 205–1 at 93). Defendant Ready was not one of the employees referenced in the grievance and was not involved in the September incident.³⁷ Thus, he would not have been disciplined or even “advised” of the incident. The memorandum cited by plaintiff, dated November 24, 2010 was between C. Tapia, the IGP Supervisor and DSP Phillips.

The fact that the defendants work in the same facility, or even on the same unit, is not sufficient to show that defendant Ready was aware of plaintiff’s grievance against two other officers or that he would have retaliated against plaintiff for a grievance in which she was not involved. As stated above, generally, it is difficult to show retaliation for actions taken against another officer. *Hare v. Hayden, supra*, 09 Civ. 3135, 2011 WL 1453789, at *4.

Further, the court finds that neither the action allegedly taken by defendant Ready, nor the action allegedly taken by defendant Ellis rises

to the level of an “adverse action” under the case law. Keeping plaintiff out of one service because defendant Ready did not have the correct call-out list, is not an action that would deter a “similarly situated” individual from exercising his rights. With respect to defendant Ellis, even assuming that he had anything to do with shortening the Purim service (which this court has found that he did not), this action would certainly not deter someone similarly situated to plaintiff from asserting his rights.³⁸ Additionally, plaintiff claims that defendant Ellis was responsible for sending *all* the inmates back to their housing unit to wait for the Rabbis. Clearly, even if that were true, plaintiff concedes that he did not return to his housing unit, and defendant Ellis could not have been retaliating against plaintiff by taking action against other inmates.³⁹ Therefore, any retaliation claims against defendants Ellis and Ready may be dismissed.

VII. Personal Involvement

A. Legal Standards

***21** Personal involvement is a prerequisite to the assessment of damages in a section 1983 case, and respondeat superior is an inappropriate theory of liability. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir.1994) (citation omitted); *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003). In *Williams v. Smith*, 781 F.2d 319, 323–24 (2d Cir.1986), the Second Circuit detailed the various ways in which a defendant can be personally involved in a constitutional deprivation, and thus be subject to individual liability.

A supervisory official is personally involved if that official directly participated in the infraction. *Id.* The defendant may have been personally involved if, after learning of a violation through a report or appeal, he or she failed to remedy the wrong. *Id.* Personal involvement may also exist if the official created a policy or custom under which unconstitutional practices occurred or allowed such a policy or custom to continue. *Id.* Finally, a supervisory official may be personally involved if he or she were grossly negligent in managing subordinates who caused the unlawful condition or event. *Id.* See also *Iqbal v. Hasty*, 490 F.3d 143, 152–53 (2d Cir.2007) (citing *Colon v. Coughlin*, 58 F.3d 865, 873) (2d Cir.1995)), rev'd on other grounds, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The mere receipt of a letter or similar complaint is insufficient to constitute personal involvement; otherwise, a plaintiff could create personal involvement by any supervisor simply by writing a letter. (*Id.*) (citing *Johnson v. Wright*, 234 F.Supp.2d 352, 363 (S.D.N.Y.2002)). In order for a letter to suffice to establish personal involvement, plaintiff would have to show that the supervisor conducted a personal investigation or personally took action on the letter or grievance. *Rivera v. Fischer*, 655 F.Supp.2d 235, 238 (W.D.N.Y.2009); *Bodie v. Morgenthau*, 342 F.Supp.2d 193, 203 (S.D.N.Y.2004). However, personal action does *not* include referring the letter to a subordinate for investigation. *Id.* (citing *Sealy v. Giltner*, 116 F.3d 47, 51 (2d Cir.1997)); *Hartnett v. Barr*, 538 F.Supp.2d 511, 524 (N.D.N.Y.2008).

B. Application

In my April 3, 2013 recommendation, I noted that in Judge D'Agostino's initial order, the allegations of personal involvement against defendants Fischer and Boll were "rather sparse." (Dkt. No. 148 at 24). Notwithstanding these "sparse" allegations, Judge D'Agostino allowed the case to continue as against these supervisory defendants. (*Id.*) In a conclusory fashion, plaintiff claimed that he had so many documents from these two defendants, he could "flood the docket." (*Id.*) (citing Dkt. No. 129 at 22). Plaintiff's response to the defendants' motion for judgment on the pleadings implied that he could make the appropriate showing, perhaps by amending his complaint. Because at that time, I was recommending that this action proceed at least to a properly supported motion for summary judgment, I did not recommend dismissing the action as against defendants Fischer and Boll based on lack of personal involvement. (*Id.*)

*²² Plaintiff did not amend his complaint, and he later stipulated to dismissing the action as against Fischer. However, in his response to the motion for summary judgment, he maintains that defendant Boll was personally involved in the alleged constitutional violations because she stated in her response to interrogatories that her "office" became aware of plaintiff's September 9, 2010 grievance when a copy of plaintiff's correspondence to a Deputy Commissioner of Program Services was "forwarded to my office." (Dkt. No. 205–3 at 355). Defendant Boll states that she had no personal knowledge or recollection of the grievance itself because the Office of Counsel is not the appropriate department to file a grievance. (*Id.* at 355–56). Defendant Boll

also states that "upon receipt of your letter, the matter was investigated by the Office of Counsel, and I responded to you on December 2, 2010. (Exhibit B attached hereto)." (*Id.* at 356). Plaintiff seizes upon this statement, and accuses defendant Boll of lying to the court because she "admits" that she responded to plaintiff.

First, it is unclear whether plaintiff's September 9, 2011 grievance against defendant Ellis has anything to do with the facts of this case.⁴⁰ Plaintiff has seen fit not to include the letter that defendant Boll said that she wrote to him in response.⁴¹ However, defendant Boll has included the letter as an attachment to her declaration in support of the summary judgment motion. (Boll Decl. Ex. A) (Dkt. No. 202–6). In her declaration, defendant Boll states that as Deputy Commissioner and Counsel for DOCCS, she serves as legal counsel for the Commissioner of DOCCS and oversees DOCCS Office of Legal Counsel which is responsible for all of the legal services necessary for the day-to-day operation of the DOCCS Central Office and the correctional institutions that make up the department. (Boll Decl. ¶ 5).

Defendant Boll states that her office routinely received hundreds of letters per year from inmates or on behalf of inmates. (*Id.* ¶ 6). When the Office receives one of these letters, one of the defendant's support staff reads it and determines which of the attorneys on her staff or other staff person should address the issues in the letter. The letter is then forwarded to the attorney or other staff person to investigate and prepare a response, if warranted. The response may be prepared for the attorney's

signature, a Deputy Counsel's signature, or defendant Boll's signature "depending on the circumstances." (*Id.*)

Contrary to plaintiff's accusations that defendant Boll is somehow trying to hide her involvement, defendant Boll admits responding to three letters received from the plaintiff. (*Id.* ¶ 7). The letter that plaintiff apparently believes is the "smoking gun" which shows that defendant Boll was personally involved in whatever constitutional violation the plaintiff alleged, is actually a letter reminding plaintiff that he had filed a grievance, and that his grievance had been appealed to the Central Office Review Committee ("CORC"), and a decision was pending. (*Id.* ¶ 8). In the letter, plaintiff was advised that the CORC would conduct a thorough investigation, and that plaintiff would be notified of its decision. (*Id.* & Ex. A). Defendant Boll states that she did not take any action to "investigate the claims contained in plaintiff's Inmate Grievance Complaint that [she] referenced in [her] December 2, 2010 letter to plaintiff."⁴² (*Id.* ¶ 9).

*23 A reading of defendant Boll's letter supports her declaration. Her office's "investigation" was not an investigation of the "merits" of the grievance, it was merely an "investigation" of the status of plaintiff's grievance and a reminder that the "Inmate Grievance Program was instituted to handle issues such as yours." (*Id.* Ex. A). Defendant Boll was reporting to plaintiff that an investigation had been conducted by other officials of DOCCS. Defendant Boll then stated:

The CORC will conduct a thorough investigation to assure that your rights are observed and your issues are addressed. If any corrective action is needed, you will be notified. As your appeal to the CORC is still pending, it is recommended that you await the decision.

(*Id.*) If an individual were able to create "personal involvement" by simply writing a letter to a superior, who was good enough to answer with an explanation such as this, it would eviscerate the well-settled principle that respondeat superior does not apply in civil rights cases. Clearly, defendant Boll did not conduct a "personal investigation" of the religious issue outlined in plaintiff's grievance.

Defendant Boll wrote another letter, dated January 28, 2011, in response to a new letter from plaintiff, dated December 20, 2011. (Boll Decl. ¶ 10 & Ex. B). Defendant Boll's letter merely stated that she had already written to plaintiff on December 2, 2010, and noted that the CORC had completed its review by correspondence dated December 8, 2010, accepting plaintiff's grievance in part. (Boll Decl. Ex. B). Defendant Boll further stated that plaintiff had been told "to bring further concerns to the attention of area supervisory staff, at [his] facility, at the time of the incident, for any remedial action deemed necessary." (*Id.*)

By the time of plaintiff's second letter to defendant Boll, the December 7th incident had occurred, and defendant Boll noted the "reoccurrence," stating that Superintendent William Hulihan had investigated the incident, "and advised you of his findings and actions on January 14, 2011." (*Id.*) Defendant Boll's explanatory letter does not create personal involvement as it is clear from the letter that she did not have anything to do with investigating the incident. She just determined that an investigation had taken place and was advising the plaintiff that he "should continue to follow the Directive for any further incidences that [h]e may have." (*Id.*)

Finally, plaintiff wrote to defendant Boll again, and she responded on March 3, 2011. (Boll Decl. ¶ 12 & Ex. C). Plaintiff claimed that no corrective action had been taken with regard to one of his grievances, and defendant Boll merely advised plaintiff that her office had contacted the staff at the correctional facility, who advised defendant Boll that plaintiff's claims had been properly investigated and corrective action had been taken. Defendant Boll took no further action. (Boll Decl. ¶¶ 12, 14). Defendant Boll states that she took no investigative action on any of plaintiff's letters. (Boll Decl. ¶ 15). She merely inquired into the status of plaintiff's grievances and reported her findings to plaintiff. Defendant Boll's letters support her assertions, and plaintiff's attempt to create personal involvement by citing portions of one of the defendant's letters, without the entire letter must fail.

***24** Plaintiff may not understand the above-cited law and may be under the

misapprehension that the simple fact that defendant Boll responded to his letters made her personally involved in the subject matter of the letter. The cases cited above show that this is not the law. Plaintiff is confusing the difference between a letter, telling him that someone else did an investigation, with a personal investigation of the merits after receipt of the letter. The former is not personal involvement, while the latter is personal involvement. Thus, the complaint may also be dismissed as against defendant Boll on this basis as well.

WHEREFORE, based on the findings above, it is

RECOMMENDED, that defendants' motion for summary judgment (Dkt. No. 202) be **GRANTED** and the complaint **DISMISSED IN ITS ENTIRETY**.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(e), 72.

Dated: July 23, 2014.

All Citations

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Footnotes

- 1 Plaintiff then attempted to appeal the Second Circuit decision to the United States Supreme Court. (Dkt. No. 130) (Notice of Appeal).
- 2 Plaintiff's response seems to take issue with the fact that defendants have now filed a motion for summary judgment because the case survived a prior motion for summary judgment, filed by plaintiff and a motion for judgment on the pleadings, filed by defendants. (Pl.'s Mem. at ¶¶ 1–7) (Dkt. No. 205–1). Plaintiff faults the court for allowing defendants to respond to plaintiff's motion for summary judgment with a letter. (*Id.* ¶ 5). The court would point out that the lack of a "formal" response from the defendants did not prejudice plaintiff. The defendants did not, as plaintiff put it, "[get] away" with anything. See Pl.'s Mem. at 5. I noted in the Report–Recommendation that defendants had not formally responded to the motion for summary judgment. (Dkt. No. 54 at 8–9). The standard for summary judgment places the burden on the party moving for summary judgment to show that no question of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. at 323; Fed.R.Civ.P. 56(a). Unless that initial burden is met, the non-moving party need not make any showing. See *Salahuddin v. Goord*, 467 F.3d at 272–73. Only if the moving party satisfies its burden, is the non-moving party required to move forward with specific facts showing that there is a genuine issue for trial. *Id.* The fact that the court found, based upon the documents submitted by plaintiff, that a genuine issue of fact existed does not preclude a subsequent motion for *summary judgment* by defendants. The defendants' interim motion for judgment on the pleadings was denied because, based upon the facts stated in the complaint, plaintiff's claims had been stated. The summary judgment motion contains additional facts in the form of affidavits and deposition testimony. See Fed.R.Civ.P. 56(c). Even if the defendants had made a prior motion for summary judgment, the court has the discretion to consider multiple motions for summary judgment if the successive motion is supported by new material. *Robinson v.. Henschel*, No. 10 Civ. 6212, 2014 WL 1257287, at *8 (S.D.N.Y. March 26, 2014) (citing inter alia *Wechsler v. Hunt Health Sys., Ltd.*, 198 F.Supp.2d 508, 514 (S.D.N.Y.2002)). See also *Rodriguez v. It's Just Lunch, Internat'l*, No. 07 Civ. 9227, 2013 WL 1749590, at *1 (S.D.N.Y. April 23, 2013) (considering cross-motions for summary judgment "[f]ollowing discovery proceedings and multiple motions to dismiss.")
- 3 Father Weber is not a defendant in this action.
- 4 Unless otherwise specified, the pages associated with a docket number will be the pages assigned to the document by the court's electronic filing system. (CM/ECF).

- 5 Plaintiff was deposed on October 8, 2013, and a copy of his deposition transcript has been included in defendants' summary judgment motion. (Dkt. No. 202–2). During his deposition, plaintiff testified that defendant Ready "had the call-out on his desk." (Dkt. No. 202–2 at 22). While defendant Ready may have had a call-out or call-outs on his desk, he did not have one with the plaintiff's name on it.
- 6 Plaintiff has also alleged a retaliation claim based on this incident, and the court will discuss that claim below.
- 7 (Ready Decl. ¶¶ 5).
- 8 This court makes no such finding.
- 9 Plaintiff's own exhibits confirm this finding. (Pl.'s Ex. G) (Dkt. No. 205–3 at 26). In his grievance documents, plaintiff states that "I signed out of Mr. Gruen's class and informed him that I had a call-out per DSP Phillips to **report to Bldg # 101** to attend Jewish Services. I subsequently attempted to sign out @ the 7–2 security desk whereby Correctional Officer Ready ... asked me where I was going." (*Id.*) Clearly, Building # 101 is not the same as Building # 7. Thus, whether an officer in Building # 101 has a document does not prove that someone in Building # 7 was given the same document.
- 10 To the extent that the failure to provide the appropriate call-out sheet was negligent or simply a mistake, defendant Ready was not responsible for that omission, and in any event, negligence is not actionable under section 1983. *Riehl v. Martin*, No. 13-CV-439, 2014 WL 1289601 at *8 n. 14 (N.D.N.Y. March 31, 2014). In his response to the motion for summary judgment, plaintiff asks why, even if defendant Ready did not have the call-out, "did he fail to pick up the phone and just call the Chaplain's Office to verify that the [plaintiff] was on the call-out?" (Pl.'s Mem. at 15). The fact that defendant Ready may or may not have acted correctly or logically, at worst, could constitute negligent action, which is not actionable under section 1983 or under RLUIPA. *Id.* See also *Booker v. Maly*, No. 9:12-CV-246, 2014 WL 1289579, at *25 (N.D.N.Y. March 31, 2014) (mistakes not actionable under the U.S. Constitution) (citations omitted); *Scott v. Shansiddeen*, No. 2013 WL 3187071, at *4 (N.D.N.Y. June 20, 2013) (negligent actions that 'impinge to some degree on an inmate's religious practices' are insufficient to support a claim under RLUIPA) (citing 42 U.S.C. § 2000cc, et seq.; *Carter v. Washington Dep't of Corr.*, No. C11-5626, 2013 WL 1090753, at *14 (W.D.Wash. Feb. 27, 2013); *Lovelace v. Lee*, 472 F.3d 174, 194 (4th Cir.2006) (simple negligence does not suffice to meet the fault requirement under section 3 of RLUIPA)).

- 11 Although the complaint initially states that the Rabbis came to see “the plaintiff,” it is clear that there were other Jewish inmates who were scheduled to participate in the Purim Services.
- 12 The declaration says “March 20, 2011.” Although plaintiff refers to this as the March 30, 2011 incident, Purim was actually March 19–20, 2011. The discrepancy in the dates is not relevant to this court’s decision because it is clear that all parties are referring to the same incident.
- 13 Rabbi Max is not a defendant in this action.
- 14 In his response to defendants’ motion for summary judgment, plaintiff has submitted his grievance and the Superintendent’s response to plaintiff’s grievance regarding this incident. (Dkt. No. 205–3, Pl.’s Exs. R–Z). In this grievance, plaintiff alleged that defendant Ellis “felt the need to answer for the officers in the bubble by stating ... ‘The Rabbi is not here so go back to the law library.’” (Pl.’s Ex. R at 2; CM/ECF p. 123). Plaintiff claimed that he complied, after the other officer repeated that plaintiff should go back to the law library. (*Id.*) Plaintiff asked to use the bathroom, and while using the bathroom, “he overheard the the ‘voice over the mic [sic]’ direct the other Jewish inmates back to their housing units because the Rabbis had not arrived.” (*Id.* & Ex. Z). The issue in the grievance appeared to be that the inmates were not allowed to enter the chapel and wait for the Rabbis. Plaintiff complained that “the Rabbis arrived at approximately 2:43 p.m., and by the time the inmates who were sent back to their units arrived for the second time; the services did not start until 3:15 p.m. **As a result, the Jewish Services were shortened** and they were dismissed at 3:45 p.m.” (Pl.’s Ex. Z) (emphasis added). The fact that the inmates were not allowed to enter the chapel prior to the Rabbi’s arrival, has nothing do with shortening the service (which would have been cut short anyway, because it is clear that the Rabbis were late in arriving). Plaintiff seems to speculate that Ellis was responsible for the other officer ordering the inmates back to their units. (Pl.’s Ex. R, Dkt. No. 205–3 at 123). In his declaration, defendant Ellis states that he disagreed that plaintiff should have been allowed to return to the library to wait for the Rabbis, but this did not affect plaintiff’s attendance at the Purim celebration.
- 15 Plaintiff originally named Sheila Marlenga, the “Facility Steward,” as a defendant in connection with plaintiff’s mail claims. The complaint was dismissed with prejudice as against Ms. Marlenga by stipulation, dated January 8, 2014. (Dkt. No. 197). Thus, the complaint has proceeded only as against defendant Kupiec with regard to the remaining issues.
- 16 The court notes that the allegations in plaintiff’s complaint relate more to retaliation than simply interference with his mail. However, in his memorandum of law in

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opposition to defendants' summary judgment motion he has one paragraph in which he discusses both interference and retaliation separately. (Dkt. No. 205–1 at ¶ 34). Because interference with mail may be a separate and independent claim from retaliation, the court will discuss all possible claims that plaintiff may have regarding the alleged interference with his mail.

- 17 The allegations in the complaint are a little unclear. In his deposition, plaintiff states that he ultimately received the package. (DT at 107). A reading of plaintiff's grievance documents indicates that he may have received a replacement package after plaintiff's father contacted the school to explain that plaintiff did not receive the January 2011 package. (Pl.'s Ex. Z(12), Dkt. No. 205–3 at 223). The court also notes that materials relating to a paralegal "course" do not constitute "legal mail." Legal mail is included in the definition of "Privileged Correspondence" and is defined, in relevant part, as correspondence with attorneys, legal representatives, and legal services organizations. See DOCCS Directive 4421(II)(A)(2) (citing [7 NYCRR § 721.2](#)).
- 18 The court notes that plaintiff's statement about "planting weapons" is irrelevant because there is no such claim in this case.
- 19 A plaintiff may not amend his complaint in a memorandum of law or other filing. *Bryant v. Greater New Haven Transit Dist.*, No. 3:12-CV-71, 2014 WL 2993754, at *7 (D.Conn. July 2, 2014) (citation omitted). The court notes that this final incident could not have been included in the complaint because it occurred after plaintiff filed this action, and plaintiff was still exhausting administrative remedies regarding this allegation, long after this complaint was filed. (See Pl.'s Ex. Z(16), Dkt. No. 205–3 at 250) (IGRC's September 22, 2011 response to plaintiff's grievance—this action was filed on May 31, 2011). Plaintiff will not be prejudiced by this court's failure to consider this allegation against defendant Kupiec because he has raised the same claim in a subsequent action that has been assigned to Senior Judge Lawrence E. Kahn and Magistrate Judge Treece. *Guillory v. Fischer*, No. 9:12-CV-280. Magistrate Judge Treece declined to recommend dismissal of this allegation in a Report–Recommendation, noting that notwithstanding my consideration of the issue in recommending denial of plaintiff's motion for summary judgment, the claim was more properly before him. See *id.* at 13–16 (Dkt. No. 46 in 12-CV-280). It is more appropriate for Judge Treece to consider the allegations regarding plaintiff's test scores along with another factual allegation against defendant Kupiec that has not been mentioned in any part of this action and that occurred after the filing of this case.
- 20 A review of plaintiff's exhibits shows that, at the time plaintiff filed this action in May of 2011, he had not completed the exhaustion of administrative remedies as to his

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certified mail claim. He did not receive the CORC denial of his grievance until July 27, 2011. (Pl.'s Ex. Z(24), Dkt. No. 205–3 at 275). Although defendants raised failure to exhaust as a defense in their answer (Dkt. No. 46, ¶ 12), they have not argued failure to exhaust in their motion for summary judgment. While defendants would not have had the opportunity to argue non-exhaustion for claims that had not been raised prior to the motion for summary judgment (the test score claim discussed above), they would have had the opportunity to argue non-exhaustion as to claims that were in the complaint. Technically defendants have not waived the exhaustion requirement by raising it in their answer. *Castillo v. Rodas*, No. 09 Civ. 9919, 2014 WL 1257274, at *15 (S.D.N.Y. March 25, 2014). This court finds that it may recommend dismissal on the merits and will do so, rather than finding only that administrative remedies were not exhausted because defendants did not argue this in their motion.

- 21 A review of plaintiff's exhibits also shows that when he filed this action, he had not exhausted his administrative remedies regarding the allegation that defendant Kupiec "destroyed" his legal mail. The document, purporting to be a "grievance," in addition to various other things, was dated May 23, 2011. (Pl.'s Ex. Z(32), Dkt. No. 205–3 at 291–302, 293). It was addressed not only to the "Complaint Department" at Mid-State, but also to District Court Judge Mordue, Ruth Goldway from the Postal Regulatory Commission, and Anne Gallaudet from the U.S. Postal Service. (*Id.* at 291). The Superintendent's decision was dated June 16, 2011, after plaintiff filed this action. (Pl.'s Ex. Z(33), Dkt. No. 205–3 at 304). However, defendants have not argued non-exhaustion in their motion, and as stated in footnote 20 above, the court will consider the merits of the claim.
- 22 The memorandum explains that the envelope must have been delivered inadvertently to the package room. (Kupiec Decl. Ex. B). An individual working in the package room (defendant Kupiec speculated that it might have been a "fill in"), opened the envelope, realized it was legal mail, put it in a plain manilla envelope with plaintiff's name and number on it, and then sent it "over to the Mailroom for processing." (*Id.*) She noted that this was the "normal procedure for mail received in packages." (*Id.*) The court also notes that this memorandum is further support for defendant Kupiec's statement that the mail room and the package room are in two different locations.
- 23 Personal involvement is a prerequisite to the assessment of damages in a section 1983 case. *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir.2003).
- 24 Contrary to plaintiff's implication, there is no indication that defendant Kupiec would have been aware of the effect of her action. Defendant Kupiec is the senior mail

room clerk. There is no indication that defendant Kupiec has any legal training or would have known the possible effect of sending plaintiff's Notice by regular mail.

- 25 To the extent that defendant Kupiec's actions could be considered negligent, as stated above, negligence is not actionable under [section 1983](#). See n. 10, *supra*.
- 26 Plaintiff's response makes much of the fact that the "package" went to defendant Kupiec's office when she stated that she had nothing to do with packages. Plaintiff believes that this "admission" proves that defendant Kupiec was also tampering with his packages. Clearly, the item was not a "package," and that is why the package office sent it to defendant Kupiec. Unfortunately someone in the package office had already made a mistake in opening the envelope, placing the documents in another envelope with plaintiff's name and prison number on it. The only contact that defendant Kupiec states that she had with this mail was to place the name of the court on the envelope and have it delivered to plaintiff through the proper channels. This statement is not, as plaintiff claims, inconsistent with defendant Kupiec's statement that she does not work in the package room and has nothing to do with the packages that are delivered for inmates.
- 27 (Dkt. No. 1 at 50) (Superintendent's Decision dated 1/14/11). The September 2010 grievance is mentioned in this decision, but that grievance was against defendant Ellis. (*Id.*)
- 28 It is also unclear how inmate Rogers would know that plaintiff was contemplating a grievance against Kupiec because plaintiff only stated that he was "putting paperwork together" for a grievance about his mail, not that such a grievance had been filed. The connection between defendant Kupiec and defendant Ready is non-existent.
- 29 Plaintiff filed a grievance against defendant Kupiec on April 22, 2011. (Compl.Ex. Z(23)). The only actions that could have conceivably been in retaliation for grievances against defendant Kupiec herself would have been the May 17, 2011 incident involving the manilla envelope with court documents inside and the inadvertent tearing of plaintiff's test scores (which is not part of this action and apparently occurred in August of 2011, based on the August 22, 2011 memorandum of apology from defendant Kupiec). None of defendant Kupiec's other actions took place subsequent to the March or April grievance against her. (Pl.'s Ex. Z(19), Dkt. No. 205-3 at 256). Plaintiff filed a grievance about his test scores on September 1, 2011. (Pl.'s Ex. Z(18), Dkt. No. 205-3 at 254) (CORC decision dated January 18, 2012). At his deposition, plaintiff testified that he did not think he had filed any prior grievances against defendant Kupiec, and there are no documents in the record reflecting grievances prior to April 22, 2011. (DT at 111).

- 30 *Gill, supra.*
- 31 Contrary to plaintiff's assertion, this action by an employee in the package room does not prove that all packages go through defendant Kupiec. The legal mail was delivered to the package room in error, someone opened it, determined that it was **not** a "package," placed the documents in a plain manilla envelope with plaintiff's name and DIN number on it, and sent it to the mail room where defendant Kupiec works. She determined that the documents were from a court, placed them back in the manilla envelope, together with writing the name of the court from which they came, and sent them through the proper channels for legal mail. (Pl.'s Exs. Z(36); Z(35), Dkt. No. 205–3 at 316, 318) (CORC Determination dated 10/15/11; Memorandum from defendant Kupiec to DSP Phillips). Although plaintiff claimed that his legal mail was "destroyed," that is clearly not true, only the envelope was missing, and defendant Kupiec had nothing to do with that. See Pl.'s Ex. Z(32), Dkt. No. 205–3 at 293).
- 32 Even if the court were considering the test score incident, the court would find no adverse action because in a letter, dated November 14, 2011, Acting Commissioner for Program Services Catherine M. Jacobsen wrote to plaintiff, explaining the facility's response to the test tearing incident. (Pl.'s Ex. Z(31)) (Dkt. No. 205–3 at 289). The facility informed Acting Commissioner Jacobsen that "the mail was taped and placed into an envelope with a note of apology explaining the error." (*Id.*)
- 33 Plaintiff claims that the withdrawal of his action constitutes the "actual injury" he needs to establish an access to courts claim.
- 34 It is not clear what "motion" would have been stricken.
- 35 CO Johnston is a former defendant who was dismissed from this action pursuant to Judge D'Agostino's September 27, 2011 Order. (Dkt. No. 19).
- 36 The September incident was only tangentially related to the exercise of plaintiff's religious rights. Plaintiff had attended a religious service in the morning of September 9, 2010, and because of the religious holiday, he was excused from all programming on that day. Plaintiff chose to attend the law library in the afternoon because he had been excused from his other program, based upon a memorandum written by DSP Phillips. Plaintiff was prevented from doing so, but the grievance was resolved in his favor. However, plaintiff did not miss a religious service, he was only prevented from spending his free afternoon, pursuing non-religious activities the way he wished.
- 37 In fact, plaintiff was convinced that no "corrective action" was taken. However, he has included a memorandum from Christopher Tapia (IGP Supervisor) to Julie Dennis, dated December 7, 2010, stating that, after receiving a telephone call from

DSP Phillips, Director Tapia spoke with CO Johnson the day that Director Tapia received the plaintiff's complaint. (Pl.'s Ex. Z(42), Dkt. No. 205-3 at 341). Director Tapia explained the proper procedure and "clarified" the memo. "The corrective action was that the memo was clarified. All referenced staff are now aware and no other complaints received." (*Id.*) No "discipline" was involved, and there is no reference to defendant Ready in this memorandum and no reason that he would have been advised of the issue because he was not involved in the incident.

- 38 In fact, the only adverse action alleged in plaintiff's grievance (aside from the shorter service) was that the inmates were not allowed to wait in the chapel for the rabbi or rabbis to arrive. Clearly, this is not "adverse" within the meaning of a retaliation claim.
- 39 During his deposition, plaintiff testified that Ellis was "taking it out" on all the other Jewish inmates because of a grievance written by plaintiff against him. (Pl.'s Dep. at 54). Plaintiff's complaint was that "Ellis won't even open the door until the last minute, so we all just hanging out outside the chapel because Ellis won't open the door." (*Id.* at 55). Failure to open a door before services are about to start can hardly be categorized as "adverse action." Once again, the court does not make any findings against defendant Ellis. The court is assuming the facts, hypothetically, for purposes of this particular discussion.
- 40 Plaintiff's interrogatory asks when defendant Boll became "aware" of plaintiff's September 9, 2010 grievance against defendant Ellis. (Dkt. No. 205-3 ¶ 7). However, none of the claims in this law suit relating to defendant Ellis occurred in September of 2010. Thus, any information in the September 9, 2010 grievance would not have even made defendant Boll aware of the claims in this action.
- 41 Clearly plaintiff received a copy of the letter as indicated in the response to the interrogatory. The letter is not supportive of plaintiff's claim, and it is disingenuous of plaintiff to omit the letter and cite only parts of defendant Boll's response to the interrogatories. Plaintiff's accusations that defendant is "lying" to the court are completely unfounded, and apparently plaintiff did not read the defendant's affidavit or see the letter that was attached. Plaintiff is constantly accusing others of nefarious conduct, while omitting important facts himself.
- 42 The court must point out that the incident with defendant Ready did not occur until December 7, 2010, and the incident with defendant Ellis did not occur until March of 2011, so the plaintiff's first letter and defendant Boll's December 2nd response could not have been related to an incident that had not yet occurred and could not have "created" any personal involvement in any event.